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A POLITICS OF (IN)SECURITY

A Philosophical Analysis of Collective Security



Michiel Besters

A Politics of (In)security

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Introduction

How to understand authorities defining behavior of individuals or groups as a security problem? Take for example behavior that is qualified by authorities as terrorist. In his notorious speech in the evening of September 11, 2001, the President of the United States, George W. Bush, qualifies the attack on the Twin Towers as an act of terrorism in that it is, in his view, aimed at disrupting and ending ‘our way of life’, that is, the way of life of Western liberal democracy.¹ Subsequently, on September 20, 2001, Bush declares that ‘the enemies of freedom committed an act of war’ which will be responded to with a ‘war on terror’.² And here is an example of behavior that was qualified as illegal. Overturning a verdict that acquits the accused for disturbing public order, the Dutch Supreme Court claimed that the act of climbing over crowd barriers and lying down right in front of the entrance of the American embassy with clothing smeared with a blood-like fluid is an instance of ‘abnormal’ behavior that disturbs the ‘normal course of public life’.³ These two examples provide an initial illustration of the central problem of this thesis, namely, the problem of collective security. How to understand such forms of behavior as manifestations of collective *insecurity*? And, accordingly, in what sense can the responses by the authorities be understood as bringing about collective *security*?

To further specify the research question of this thesis, let us turn to yet another example: illegal immigration into the European Union (hereafter: EU). Some time ago a remarkable photo was posted on Twitter by José Palazón,⁴ director of *Asociación Pro Derechos de la Infancia*, accompanied by the following comment: ‘Immigrants on the fence, expulsions and a

¹ George W. Bush, ‘Address to the Nation on the September 11 Attacks’, *Selected Speeches of George W. Bush 2001-2008*, pp. 57-58, especially p. 57 (http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf, accessed 6 August 2015).

² George W. Bush, ‘Address to the Joint Session of the 107th Congress’, *Selected Speeches of George W. Bush 2001-2008*, pp. 65-73, especially p. 66 (http://georgewbush-whitehouse.archives.gov/infocus/bushrecord/documents/Selected_Speeches_George_W_Bush.pdf, accessed 6 August 2015).

³ Hoge Raad [Dutch Supreme Court], case number 00233/06, January 2007 (<http://uitspraken.rechtbank.nl/inzien-document?id=ECLI:NL:PHR:2007:AZ2104>, accessed 28 August 2014).

⁴ <https://twitter.com/PRODEINORG/status/524927960961527808>, accessed 29 July 2015. I wish to thank José Palazón for his kind permission to reproduce the picture in this book.

game of golf. Only in Melilla'.⁵ The photo features the 'surreal scene'⁶ of two golf players at a golf course of *Club Campo de Golf de Melilla*, with, in the background, eleven African migrants sitting on top of the border fence separating the Spanish enclave Melilla from Morocco. In the right upper corner, standing on a ladder, a police officer is approaching the migrants. One of the golf players is making a swing while the other is turned towards the border fence.



Photo by José Palazón

Certifying that the photo is not manipulated, Palazón emphasized its symbolism in an interview with the Spanish newspaper *El País*. 'The photo reflects the situation really well – the differences that exist here and all the ugliness that is happening here'.⁷ The symbolism of the photo concerns the economic disparities between the European Union (hereafter: EU) and African countries, a divide that is enforced by a border fence. The photo makes clear that migrants are predominantly viewed as a security problem by the EU, whereas the reason why the African migrants undertake the attempt to cross the border is often of an economic nature.

The definition of migration as a security problem is deeply rooted in EU policies. In particular, since the end of the 20th century, immigration has been defined in EU policies as 'illegal immigration'. The Treaty of Amsterdam (1997) established that the EU shall adopt measures with respect to 'illegal immigration and illegal residents, including repatriation of illegal residence'.⁸ In the course of implementing the Treaty of Amsterdam, the Tampere Programme (1999) announced concrete measures 'to stop illegal immigration' and 'to tackle [illegal

⁵ *The Guardian*, 'African migrants look down on white-clad golfers in viral photo', 23 October 2014 (<http://www.theguardian.com/world/2014/oct/23/-sp-african-migrants-look-down-on-white-clad-golfers-in-viral-photo>, accessed 29 July 2015). The Guardian mentions the original comment that accompanied the photo. I could not retrieve this original comment on the twitter-account of *Asociación Pro Derechos de la Infancia*.

⁶ *Time*, 'Surreal Scene of Migrants Atop Spanish Border Fence', 23 October 2014 (<http://time.com/3534491/spain-african-migrants-melilla-golf/>, accessed 29 July 2015).

⁷ *El País*, 'No es un montaje: la foto de la valla de Melilla y el campo de Golf', 22 October 2014 (http://verne.elpais.com/verne/2014/10/22/articulo/1414007054_000118.html, accessed 29 July 2015). The translation derives from the article of *The Guardian*.

⁸ The Treaty of Amsterdam Amending The Treaty On European Union, The Treaties Establishing The European Communities And Certain Related Acts, 2 October 1997, article 73k.3.b.

immigration] at its source'.⁹ Some years later, when drafting a European security strategy entitled 'A Secure Europe in A Better World' (2003), the Council of the European Union identifies illegal immigration as a 'key threat' to the EU.¹⁰ And in the Hague Programme (2004), the follow-up of the Tampere Programme, the EU adopts a militaristic tone of voice speaking of the 'fight' and 'combat' against illegal immigration.¹¹

In response to this intensification of what scholars have called the 'securitization' of migration, the outcry of critics has become louder and louder. Scholars, NGO's, and policy think tanks, they all send a similar message of distress.¹² The security perspective has, in their view, taken the upper hand and has come to outweigh the economic and humanitarian approach to migrants. According to these critics, migration is primarily an effect of globalization and should be treated accordingly. Franck Düvell provides a concise formulation of the argument used by critics to dismiss the definition of irregular migration as *illegal* immigration. According to Düvell,

'the concept of "illegal migration" is a legal, political and social construct of the twentieth century . . . It is a blurred concept; it is loaded with ideological import; it is highly politicized; and political intentions lurk behind its application and can occasionally be an iron too hot to touch. In fact, "illegal migration" has become a kind of war cry to be found worldwide in policies as diverse as trade agreements, development policies, military strategies and international relations'.¹³

In short, in Düvell's view, the understanding of irregular migration as illegal migration is a construction that can and needs to be overturned. For, as he argues, 'what was once declared illegal can also be declared legal'.¹⁴

The debate on illegal immigration in EU context provides an acute illustration of the central research question that I wish to examine in this thesis: *How to define a critical concept of collective security?* How to conceptualize collective security both providing a critical angle on the notion, while also accounting for its intrinsic value? I will approach the central question of this thesis adopting a philosophical perspective. Analyzing collective security from a philosophical

⁹ Presidency Conclusion, Tampere European Council 15 and 16 October 1999, point 3 and 23.

¹⁰ Council of the European Union, *A Secure Europe in a Better World – European Security Strategy*, 12 December 2003, p. 4.

¹¹ Council of the European Union, *The Hague Programme: strengthening Freedom, Security and Justice in the European Union*, 13 December 2004.

¹² See for example the CHALLENGE Project ("The Changing Landscape of European Liberty and Security"), a research project funded by the Sixth Framework Programme of DG Research of the European Commission: Didier Bigo, Sergio Carrera, Elspeth Guild & R.B.J. Walker, 'The Changing Landscape of European Liberty and Security: The Mid-Term Report of the Challenge Project', *CEPS Research Paper No. 4*, 2007; Didier Bigo, Elspeth Guild & Sergio Carrera, 'The CHALLENGE Project: Final Policy Recommendations on the Changing Landscape of European Liberty and Security', *CEPS Research Paper No. 19*, 2009.

¹³ Franck Düvell, 'Irregular Migration: a Global, Historical and Economic Perspective', in: Franck Düvell (ed.), *Illegal Immigration in Europe. Beyond Control?*, Palgrave Macmillan: Basingstoke/New York, 2006, pp. 14-39, especially p. 29.

¹⁴ Franck Düvell, 'Framing and Reframing Irregular Immigration', in B. Anderson & M. Keith, *Migration: The COMPAS Anthology*, COMPAS: Oxford, 2014 (<http://compasanthology.co.uk/framing-reframing-irregular-migration/>, accessed 29 July 2015).

perspective, I will inquire into its deep structure. My claim is that collective security presupposes the notion of collective subjectivity, which can be but need not necessarily conceived as the state.¹⁵ The notion of collective subjectivity refers to a collective in the first-person perspective as a (putative) acting unity. Although I will reflect on the distinction between security conceived from the perspective of the individual and from the perspective of the collective, I take the latter as the starting point, as it forestalls an easy juxtaposition between the individual and the collective perspective. I will argue that conceptions of collective security generally assume a reductive understanding of collective subjectivity, defining it predominantly as the object of security. This is reductive in that a collective subject is not only the instance that needs to be secured but also the instance that is secure or insecure and relates to itself as such. In order to account for the collective subject in the twofold sense of an instance that needs securing and an instance that is secure or insecure, I will reflect on its specific mode of being in a way that rejects the move to hypostatize or reify its existence. The key to analyzing the mode of being of collective subjectivity is a reflexive notion of collective identity. The shift to this ontological level will allow me to reassess questions such as: What are the existential modalities of collective insecurity? What are the social, political and legal manifestations of collective insecurity? And what responses are available to a collective to deal with insecurity?

The focus of this book is collective security. I am well aware that writing about security in a collective sense is a tricky issue nowadays. Debates on collective security have the tendency to polarize between proponents and opponents, between advocates and critics. Whoever attempts to write about collective security in a positive way, even though critically, is vulnerable to the criticism of being an ideologist of the status quo. But, in my view, such a categorical rejection of approaches that make a stand for the value of security is a dead-end street because then the only way left is a total critique of security. Instead of taking a stance in this often polarized debate and thus affirming the terms in which it takes place, my aim is rather to open up the debate on collective security by reassessing its terms. In fact, one of the aims of this thesis is reconsidering the military, war-like understanding of collective security, taking it beyond the all or nothing problem of existence/non-existence.

Research approach

This is a thesis in the philosophy of law. The aim of this thesis is to develop a conceptual framework to assess what it means to define behavior as a security problem from the perspective of a collective. This means that I will be concerned to analyze how behavior appears as a security problem from the perspective of political and legal order. At the end, I will return to the problem of collective security at the policy level, related to the issue of illegal immigration in EU context, in order to show what the philosophical itinerary has given us. In this respect, my aim is modest. I do not intend to resolve the dilemmas with which policy makers struggle.

¹⁵ This philosophical focus distinguishes this book from Ian Loader's and Neil Walker's, *Civilizing Security*, Cambridge University Press: Cambridge, 2007, which provides a cogent and comprehensive analysis of security from which I have greatly benefited. Defining security as a 'public good', Loader and Walker hold a plea for a reappraisal of the state. Alternatively, I will cast the notion of the state in philosophical terminology of collective subjectivity, inquiring into the deep structure of collective security.

Instead, this thesis attempts to redirect the conceptual understanding of collective security, opening up new perspectives on the problem of illegal immigration. In offering an alternative conceptual framework to understand issues of collective security, it hopes to inspire policy makers and scholars.

The general methodology of this book is conceptual analysis. I will start by scrutinizing the conceptual framework of security scholars. This means that my conceptual starting point is security studies, a sub-discipline of international relations. I will draw on the works of critical security scholars, especially the works of Didier Bigo and Jef Huysmans, two authors who take their cue from Michel Foucault's theory of governmentality. To the extent that these security scholars conceptualize security in a constructivist way, their reflections will direct us to the problem of the security referent, i.e. the notion of collective subjectivity. My claim is that the conception of security as technique of government is premised on a reductive understanding of collective subjectivity, namely, as a discursive unity. This is where my philosophical perspective comes into the picture, and which will allow me to cast the problem of the security referent at a philosophical level.

Searching an alternative for the critical, discursive conception of collective security, I will turn to discuss the existential conception of collective security that can be educed from the political and legal philosophy of Carl Schmitt (1888-1985). Although Schmitt's conception of collective security lacks a critical angle, it does provide insight into its positive value. The central theme of Schmitt's theory is the relation between politics and law; his oeuvre comprises texts on subjects such as dictatorship, sovereignty, political theology and constitutional theory. What makes Schmitt's political and legal theory interesting with respect to our research question is that rather than analyzing collective security starting from the perspective of the individual, in line with the tradition that goes back to Thomas Hobbes, he can be read as conceptualizing collective security starting from what he calls the 'suprapersonal' perspective of a collective. I will read Schmitt as a concrete order thinker, a legal-theoretical approach that he defines in a polemical discussion with Hans Kelsen's normativism, and that finds its place within the legal-theoretical strand of institutionalism. This reading of Schmitt has some received some attention recently.¹⁶ Within the context of this book I will elaborate on Schmitt's theory of concrete order for the purpose of teasing out the idea that collective security presupposes the notion of collective subjectivity as an existential unity. For this reason my reading of Schmitt is selective, focusing on some aspects of his thinking, while leaving aside many others. I am well aware that Schmitt is not an uncontroversial author, as his political and legal theory is tainted by his engagement with the Nazi regime. The facts speak for themselves: Schmitt joined the Nazi-party in 1933 and acted as *Kronjurist des Dritten Reiches* between 1933 and 1936. However, and despite Schmitt's political engagement with the Nazi regime, I am interested in the conceptual theses that he puts forward, without wanting to defend his ideas on their own terms. This is less controversial. Schmitt is widely recognized for his conceptual

¹⁶ Cf. Mariano Croce & Andrea Salvatore, *The Legal Theory of Carl Schmitt*, Routledge: Abingdon, 2013.

contribution to political and legal philosophy.¹⁷ Initiating a conceptual debate with Schmitt, I attempt to get to the bottom of the problem of collective security.

While Schmitt's political and legal theory allows me to develop the concept of collective security starting from the notion of collective subjectivity in first-person perspective, his analysis is highly problematic. Indeed, while casting collective subjectivity in existential terms, he does so in a reified sense. In order to transform the existential conception of security that I abstract from Schmitt, I will develop a reflexive interpretation of collective subjectivity on the basis of (post-)phenomenological theories of identity. In particular, I will draw on Paul Ricoeur's (1913-2005) theory of identity, but I will also use the critical reconsideration of the phenomenological conception of identity by Jacques Derrida (1930-2004) and, in his wake, Jean-Luc Nancy. (Post-)phenomenology is the movement in Western philosophy that starts from and aims to critically articulate the perspective of the first-person, singular or plural, adopting the radical reflexive stance that an experience is always the experience of an agent, as Charles Taylor puts it.¹⁸ The reassessment – or deconstruction, if one prefers – of Schmitt's notion of collective subjectivity, conceptualizing existential unity in terms of the interrelated notions of sameness and selfhood, will allow me to develop a critical existential conception of security.

Outline of the book

The first Chapter elaborates the conception of security as a technique of government, analyzing the conceptual framework of security studies. Steering away from the objectivism of traditional approach of security studies, critical security scholars have adopted a constructivist approach, especially those scholars that draw on Foucault's theory of governmentality. Security means essentially framing or construing an issue as a security problem. In contrast to other critical approaches in security studies, the Foucaultian approach not only perceives threats as constructs but also posits the security referent as a discursive unity. The problem with this instrumental understanding of security is that it can only account for collective subjectivity as the object of security and hence can at best postulate—but not properly explain—collective subjectivity as an instance that can be secure or insecure. Despite the opposition in their theoretical orientations, there is also an important continuity between the traditional and the Foucaultian approaches. They both assume security to concern the problem of existence/non-existence of the security referent.

In the second Chapter I will scrutinize the conception of security as collective self-preservation on the basis of Carl Schmitt's political and legal theory. This conception forms an alternative to the discursive conception of security in that it provides a positive definition of collective security, giving pride of place to the first-person perspective of a collective subject as an existential unity. I elaborate the notion of existential unity on the basis of the concept of concrete order, successively approaching it as an institution, normal order, homogeneity and

¹⁷ Cf. David Dyzenhaus, *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Herman Heller in Weimar*, Oxford University Press: Oxford, 1999; Chantal Mouffe, *The Democratic Paradox*, Verso: London, 2000.

¹⁸ Charles Taylor, *Sources of the Self. The Making of the Modern Identity*, Cambridge University Press: Cambridge, 1989, p. 130.

nomos. Defining insecurity in terms of the metaphysical notion of contingency, Schmitt's analysis permits us to distinguish its various manifestations, ontological, social, political and legal. Yet, to the extent that Schmitt assumes collective subjectivity to exist as an original substantial unity, he does not adequately conceptualize the contingency of collective subjectivity. Schmitt does not distinguish between contingency as the experience of *what* a collective is as a unity and *that* it is a unity. As a consequence, like security scholars, Schmitt understands security in terms of the problem of existence/non-existence: to be or not to be. No wonder that security, thus defined, calls for an all or nothing response. This understanding of the contingency of collective subjectivity limits the possibilities available to deal with insecurity to boundary enforcement, that is, the enforcement of a collective subject's original unity.

The third Chapter offers a radical transformation of Schmitt's conception of security and attempts to integrate and further develop the critical points put forward by security scholars representing the Foucaultian approach. In this Chapter I will define security as collective self-assertion. Collective self-assertion concerns the idea that in responding to challenges collective subjectivity can transform its existence as a unity. The key to this transformation is the reflexive understanding of the existential unity of collective subjectivity on the basis of Paul Ricoeur's account of identity in terms of the interrelated notions of identity as sameness and as selfhood. Ricoeur's notion of identity requires a deconstruction of the understanding of existential unity as an original unity in that it entails a radicalized understanding of the temporal mode of being of collective subjectivity. The reflexive mode of being of collective subjectivity implies that it exists as a *represented* unity, that is, as a claim to unity that must be forever renewed. As a representation, collective subjectivity only exists as a unity in a retroactive mode, hence is irreducibly contingent both in the sense what it is as a unity and that it is a unity. This distinction between contingency as that-ness and as what-ness requires a further differentiation of the palette of manifestations of collective insecurity offered by Schmitt. I will argue that collective security fundamentally revolves around the problem of anarchy, both in a factual and in a normative sense. The twofold contingency of collective subjectivity also implies that the interpretation of a security threat is variable and should be understood as a challenge that can be responded to not only by boundary enforcement, as presupposed by Schmitt, but also by boundary constitution.

Chapter Four compares the conceptions of security as a technique of government, as collective self-preservation and as collective self-assertion, both conceptually and as concerns their practical implications. As concerns the conceptual ramifications, the Chapter establishes that the conceptions of security as a technique of government and as collective self-preservation revolve around the understanding of collective subjectivity as an original unity. Whereas Schmitt celebrates the interpretation of collective subjectivity as an original, existential unity, the Foucaultian approach rejects it and replaces it with notion of a discursive unity. From these opposed appraisals of collective subjectivity follow opposed conceptions of security. If security as collective self-preservation boils down to mere boundary enforcement, security as technique of government collapses into boundary constitution. I will show that the

conception of security as collective self-assertion forms an alternative to the other two conceptions. By understanding collective subjectivity as a represented unity, my alternative conception can do justice to the performativity of security practices as well as to the irreducible aspect of boundary enforcement. Subsequently, this Chapter applies the three conceptions of security to the case of the border fences around Ceuta and Melilla. Whereas the conception of security as a technique of government results in an utterly critical evaluation of the practice of the border fences, the conception of security as collective self-preservation provides a justification of the current external border regime of the EU. Alternatively, the conception of security as collective self-assertion interprets irregular migration both as a factual and as a normative *challenge* to the EU, i.e. as both threat *and* opportunity, thus opening up the possibilities to deal with it both by means of boundary enforcement and boundary constitution.

Finally, the conclusion will summarize the argument of the book and formulate the book's six main theses.

Chapter 1

Security as Technique of Government

1.1 Introduction

How to conceptualize collective security critically, taking into account both its civilizing and uncivilizing dimensions?¹⁹ That is, how to conceptualize collective security both in a constructive and a critical sense? In order to develop a critical concept of collective security, in this chapter I will analyze the conceptual framework of security studies. There is much to learn from a theoretical enterprise that has security as its subject matter. Indeed, how do security scholars conceptualize collective security? Remarkably, this question cannot be answered in a straightforward manner. In fact, it has been noted that security studies are in ‘a considerable state of disarray’²⁰ due to the fact that the discipline lacks a clear definition of its subject matter. This is not simply an observation from an outsider. It is also proclaimed by security scholars themselves that their discipline is struggling with an ‘identity crisis’.²¹ As we will see, although there is indeed much to learn from security studies, the discipline does not provide a satisfactory conception of collective security. Instead, an analysis of the conceptual framework of security studies is helpful in that it enables us to formulate in a more precise way the core of a critical concept of collective security. I submit that by defining security in (anti-)objectivist terms, security scholars fail to get to the bottom of the problem of collective security because they do not account for security and insecurity as ontological notions, that is, as modes of being of a subject, individual or collective. In order to go beyond the dichotomy between objectivism and constructivism, my analysis demands a return to the philosophy of the (collective) subject. In this respect, my analysis of the conceptual framework of security studies paves the way for the route that I will pursue in the following chapters.

To the extent that the conceptual framework of security studies is based on a realist theory of international relations, security scholars have come to define the referent of security as an object, i.e. the ‘referent object’. Methodological reconsiderations have led to a critical assessment of the notion of the referent object. In fact, building on other contributions, a

¹⁹ The terms in which this question is phrased derive from Loader & Walker, *Civilizing Security*, 2007.

²⁰ Hans Lindahl, ‘Border Crossings by Immigrants: Legality, Illegality, and Alegality’, *Res Publica*, vol. 14, 2008, pp. 117–135, especially p. 119.

²¹ Jef Huysmans, *The Politics of Insecurity. Fear, Migration and Asylum in the EU*. Routledge: London, 2006, p. 15 ff.

Foucaultian turn in security studies has taken place. Drawing on Foucault's theory of governmentality, security scholars have exchanged the objectivism of the realist approach for a radical form of constructivism. In this sense, the Foucaultian approach results in what I will call the conception of security as a technique of government. Rather than defining the referent of security as an object, the Foucaultian approach renders it as a construct, i.e. a 'dependent effect'²² of security framing. While this approach contributes a number of very fruitful insights, some of the implications of this move are also problematic. For, ultimately, the Foucaultian approach erases the notion of the security referent as a subject in the first-person perspective, 'like a face drawn in sand at the edge of the sea', to borrow Michel Foucault's famous final words from *The Order of Things*.²³

I am well aware that the interpretation of the conceptual framework of security studies that I will develop in the following pages is quite limited in that I focus mainly on two theoretical positions, namely the traditional and the Foucaultian approaches, and ignore others. In my view, the traditional and the Foucaultian approaches mark the extremes of the conceptual framework of security studies; they represent the most radical conceptual positions that can be adopted within the discipline of security studies. This simplification of the conceptual framework of security studies is not problematic in so far that I don't pretend that my analysis is exhaustive of the theoretical landscape of security studies. Rather, my argument in this chapter is concerned with what I deem to be the core problem of the conceptual framework of security studies: the security referent. As will transpire, the key role of the Foucaultian approach within my analysis of the conceptual framework of security studies has an additional advantage. Foucault's theory of governmentality actually permits me to elaborate the philosophical notion of collective subjectivity that resists accommodation in the Foucaultian approach.

The argument of this chapter unfolds in four steps. In section two, I discuss the traditional theoretical approach on the basis of Kenneth N. Waltz's structural realism and its share in the crisis of security studies. Subsequently, in section three, I deal with three attempts to settle the crisis of security studies, three contributions that have set the stage for the Foucaultian approach: the widening debate, the securitization theory and critical security studies. In the fourth section I analyze the Foucaultian approach, i.e. the approach developed by security scholars who take their cue from Foucault's theory of governmentality. In order to tease out the philosophical stakes of the Foucaultian approach, in the fifth section I zoom in on some elements of Foucault's theory of governmentality. The conclusion ties together the argument of this chapter and draws the lesson that we can take from it in our attempt to develop a critical conception of security.

²² I borrow this notion from Rudi Visker, *Truth and Singularity. Taking Foucault into Phenomenology*. Dordrecht: Kluwer Academic Publishers, 1999, p. 3.

²³ Michel Foucault, *The Order of Things. An Archeology of the Human Sciences*, Routledge: London/New York, 2005, p. 422.

1.2 The Crisis of Security Studies

In this section I discuss the traditional theoretical framework of security studies in view of identifying the problem underlying the crisis of security studies. To this end, the forthcoming discussion focusses on two aspects in particular. First, I attempt show that the traditional approach is a product of the historical context from which it emerged. The second aspect relates to the methodology of the traditional approach: objectivism.

1.2.1 The Birth of Security Studies

The emergence of security studies as a distinct field of study within the realm of international relations coincides with the beginning of the Cold War. The roots of security studies lie in the US and much of the research was conducted by think tanks such as the RAND Corporation. In fact, it is only in the 1960s that security studies were institutionalized at universities.²⁴ Initially, the main focus of security studies was on national security and military threats, in particular ‘the revolutionary impact of nuclear weapons’.²⁵ As Baldwin observes, ‘if military force was relevant to an issue, it was considered a security issue; and if military force was not relevant, that issue was consigned to the category of low politics’.²⁶ This preoccupation with military threats implied that security studies became ‘militarized’.²⁷ The period from the start of the Cold War to the outbreak of the war in Vietnam has been called the ‘golden age’ of security studies.²⁸ It is also in this period that the discipline of security studies was ‘exported’ to Europe.²⁹ The ‘golden age’ of security studies was followed by a period of decline, a period that spans the war in Vietnam.³⁰ In fact, the end of the war in Vietnam marked a renewed interest in security studies in the US. Stephen M. Walt describes this period as the ‘renaissance’ of security studies.³¹

The end of the Cold War challenged security studies again, but now more fundamentally than during the Vietnam War. The reason for this is that the focus on military threats to national security lost its naturalness when the bipolar world order faded away. Actually, the termination of the bipolar world order ‘provided the shock to the theoretical systems from which international security had been born as a concept and “security studies” as its appropriate academic discipline’.³² Some scholars continued to defend the traditional focus of security studies.³³ Others claimed that this attempt is doomed from the start because ‘the Cold War

²⁴ Ole Waever & Barry Buzan, ‘After the Return to Theory: The Past, Present, and Future of Security Studies’, in A. Collins (ed.) *Contemporary Security Studies*. Oxford: Oxford University Press, 2010, pp. 463-483, especially pp. 470-473.

²⁵ Stephen M. Walt, ‘The Renaissance of Security Studies’, *International Studies Quarterly*, vol. 35, no. 2, 1991, pp. 211-239, especially p. 214.

²⁶ David A. Baldwin, ‘The concept of security’, *Review of International Studies*, vol. 23, 1997, pp. 5-26, especially p. 9.

²⁷ David A. Baldwin, ‘Security Studies and the End of Cold War’, *World Politics*, vol. 48, no. 1, 1995, pp. 117-141, especially p. 125.

²⁸ Walt, ‘The Renaissance of Security Studies’, 1991; Baldwin, ‘The concept of security’, 1997.

²⁹ Waever & Buzan, ‘After the Return to Theory: The Past, Present, and Future of Security Studies’, 2010, p. 472.

³⁰ Walt, ‘The Renaissance of Security Studies’, 1991, p. 215-216; Baldwin, ‘Security Studies and the End of Cold War’, 1995, p. 124.

³¹ Walt, ‘The Renaissance of Security Studies’, 1991. See also Edward A. Kolodziej, ‘Renaissance in Security Studies? Caveat Lector!’, *International Studies Quarterly*, vol. 36, no. 4, 1992, pp. 421-438.

³² Bill McSweeney, *Security, Identity and Interests. A Sociology of International Relations*. Cambridge: Cambridge University Press, 1999, p. 2.

³³ Walt, ‘The Renaissance of Security Studies’, 1991.

was not just another event to be analyzed; rather, it was the progenitor of the field and its central focus from 1955 on'.³⁴ In fact, the question was discretely raised whether there is still any role at all for security studies after the Cold War. Furthermore, the end of the Cold War caused a 'deep split'³⁵ between security studies in the US and Europe. Whereas in Europe the post-Cold War situation stimulated critical research, in the US the new situation in world politics was experienced more or less as another disturbance of the main task of security studies.³⁶ In any case, what the post-Cold War situation revealed is that the theoretical framework of security studies is strongly, not to say exclusively, determined by the historical context from which it emerged.

1.2.2 Structural Realism

The traditional conceptual framework of security studies is Kenneth N. Waltz's neorealist or structural realist theory of international relations. The core of Waltz's theory is the notion of 'political structure'.³⁷ Waltz argues that the structure of the international system is an enduring feature that provides an explanation for the behavior of 'political units' in the realm of international politics. The concept of political structure comprises two levels. The first and most fundamental level is the domestic political structure, that is to say, the level of states. The state is rendered as the 'primary political unit'.³⁸ According to Waltz, states are hierarchical and centrally organized units that seek to ensure their survival: 'Survival is a prerequisite to achieving any goals that states may have, other than the goal of promoting their own disappearance as political entities'.³⁹ This means, first of all, that at the heart of structural realism is the idea that states behave as self-interested, rational actors.⁴⁰ And, secondly, security studies assume that security is about the problem of the existence/non-existence of political units.

The second level of political structure concerns the relation between states, that is, the 'co-action' of states.⁴¹ Given the fact that states are all concerned with their own survival, the international system is fundamentally anarchical. In this respect, the international system is governed by the 'principle of self-help'⁴²: a state seeks to preserve its own autonomy. As Waltz submits, 'in anarchy, security is the highest end. Only if survival is assured can states

³⁴ Baldwin, 'Security Studies and the End of Cold War', 1995, p. 132.

³⁵ Waever & Buzan, 'After the Return to Theory: The Past, Present, and Future of Security Studies', 2010, p. 474.

³⁶ Waever & Buzan, 'After the Return to Theory: The Past, Present, and Future of Security Studies', 2010, pp. 474-475.

³⁷ Kenneth N. Waltz, *Theory of International Politics*. Reading: Addison-Wesley, 1979, p. 79 ff.

³⁸ Waltz, *Theory of International Politics*, 1979, p. 91. The state-centeredness of structural realism implies that 'the state is *ontologically prior* to the international system. The system's structure is produced by defining states as individual unities and *then* by noting properties that emerge when several unities are brought into mutual reference. For the neorealist, it is impossible to describe the international structures without first fashioning a concept of state-as-actor', Richard K. Ashely, 'The poverty of neorealism', *International Organization*, vol. 38, no. 2, 1984, pp. 225-286, especially p. 240, italics in original.

³⁹ Waltz, *Theory of International Politics*, 1979, p. 92.

⁴⁰ Keith Krause & Michael C. Williams, 'From Strategy to Security: Foundations of Critical Security Studies', in Keith Krause & Michael C. Williams (eds.) *Critical Security Studies. Concepts and Cases*. London: UCL Press, 1997, pp. 33-59, especially pp. 41-42.

⁴¹ Waltz, *Theory of International Politics*, 1979, p. 104. Waltz distinguishes between interaction and co-action: interaction takes place at the level of units, co-action concerns the relation between units.

⁴² Waltz, *Theory of International Politics*, 1979, p. 91.

safely seek such other goals as tranquility, profit, and power'.⁴³ The invocation of security by states legitimizes the use of force and exceptional powers.⁴⁴ Because security is assumed to be about the all or nothing question of existence/non-existence, it is considered to concern the realm of exceptional rather than normal politics. According to Waltz, the quest to maintain the states' autonomy and the enduring uncertainty about the intentions of other states results in the so-called security dilemma: actions by a state that are taken for the purpose of its own security can threaten the security of other states.⁴⁵

Waltz develops his structural realist account of international politics as a social scientific theory. His theory is to be tested by inferring hypotheses from it and subjecting these to experimental or observational tests.⁴⁶ This means that structural realism assumes that the world 'out there' is given, and it is the task of scholars to identify regularities in international politics and patterns of state behavior that can be validated with empirical research.⁴⁷ In this respect, the structural realist approach is a genuinely positivist approach.⁴⁸ When underpinned with empirical research, a security threat can be labelled as objective. Moreover, to the extent that structural realism regards security studies as a social scientific discipline, it posits the 'state-as-actor' as an object.⁴⁹ This has lead security scholars to define the referent of security, i.e. the state, as the 'referent object'. Consequently, the traditional concept of security based on structural realism can be defined in terms of what I will call the 'threat-referent object matrix'.

Notice that the definition of security developed by the traditional approach implies a particular understanding of the distinction between inside and outside. It suggests that the referent object is a self-contained unit that is challenged by external threats. The traditional approach 'presupposes that threats arising from outside a state are somehow more dangerous to its security than threats that arise from within'.⁵⁰ In this respect, R.B.J. Walker argues, the traditional approach is confined to 'the horizons of modern political imagination'.⁵¹

The end of the Cold War demonstrated the failure of the traditional approach and has plunged security studies into a crisis. The traditional approach forfeited its explanatory power as it was unable to persuasively deal with new issues such as migration. Countering the neorealist establishment in the US and Europe, it was argued that the concept of security was

⁴³ Waltz, *Theory of International Politics*, 1979, p. 126.

⁴⁴ Barry Buzan, Ole Waever & Jaap de Wilde, *Security. A New Framework For Analysis*. London: Lynne Rienner Publisher, 1998, p. 21.

⁴⁵ Waltz, *Theory of International Politics*, 1979, pp. 186-187. Also Jennifer Mitzen, 'Ontological Security in World Politics: State Identity and the Security Dilemma', *European Journal of International Relations*, vol. 12, no. 3, 2006, pp. 341-370, especially p. 341.

⁴⁶ Waltz, *Theory of International Politics*, 1979, p. 13.

⁴⁷ Christine Agius, 'Social Constructivism', in Alan Collins (ed.), *Contemporary Security Studies*. Oxford University Press: Oxford, 2010, pp. 49-68, especially p. 59.

⁴⁸ Ashely, 'The poverty of neorealism', p. 248 ff.; Agius, 'Social Constructivism', 2010, p. 61.

⁴⁹ Keith Krause & Michael C. Williams, 'Broadening the Agenda of Security Studies: Politics and Methods', *Mershon International Studies Review*, vol. 40, 1996, pp.229-254, especially p. 233; Krause & Williams, 'From Strategy to Security: Foundations of Critical Security Studies', 1997, p. 42; Steven Forde, 'International Realism and the Science of Politics: Thucydides, Machiavelli, and Neorealism', *International Studies Quarterly*, vol. 39, no. 2, pp. 141-160.

⁵⁰ Richard H. Ullman, 'Redefining Security', *International Security*, vol. 8, no. 1, 1983, pp. 129-153, especially p. 133.

⁵¹ R.B.J. Walker, *Inside/outside: international relations as political theory*. Cambridge University Press, Cambridge, 1993, p. 17.

an ‘inadequately explicated concept’.⁵² Indeed, as Baldwin observes, ‘despite widespread use of “security” by scholars and politicians during the last forty years, not much attention has been devoted to explicating the concept’.⁵³ Because of the close relation between policy makers and academics in the security studies community, ‘the concept of security was seldom addressed in terms other than the policy interests of particular actors’.⁵⁴ Krause and Williams provide an explanation for the lack of interest in conceptual analysis by security scholars: ‘To be a member of the security studies community has traditionally meant that one already *knows* what is to be studied. Both the object of security (what is to be secured) and the means for studying it are treated as largely given and self-evident’.⁵⁵ Consequently, the challenge to security studies in the post-Cold War era is to redefine the concept of security, i.e. the threat-referent object matrix. What is the scope of security? That is, what range of issues should be labelled as security issues? And what is the primary site of security? Barry Buzan formulates the challenge to security studies even more radically. According to him, ‘the task is to habilitate the concept of security – it cannot be rehabilitated because it has never been properly developed’.⁵⁶

1.3 Securing Security Studies

A number of attempts have been undertaken to secure security studies as a distinct field of study. In this section I will restrict myself to three contributions that aim to resolve the crisis of security studies, namely the widening debate, the securitization theory and critical security studies. To be sure, although these contributions are essential to the debate on the crisis of security studies, they do not exhaust this debate (nor does my discussion of these contributions, for that matter). Actually, the reason why I draw attention to these three contributions is that they prepare the stage for the approach inspired by Foucault’s theory of governmentality. By discussing how the widening debate, the securitization theory and critical security studies each propose ‘to cut the Gordian knot in which security studies has tied itself’⁵⁷ I will be able to highlight some elements that have shaped the Foucaultian approach.

1.3.1 The Widening Debate

An early attempt to settle the crisis of security studies is to ‘widen’ the threat-referent object matrix. This attempt is known as the ‘widening debate’ and involves two separate theoretical moves.⁵⁸ The first is to ‘broaden’ the range of potential threats to state security by including,

⁵² Baldwin, ‘The concept of security’, 1997, p. 12.

⁵³ Baldwin, ‘The concept of security’, 1997, p. 24.

⁵⁴ Barry Buzan, *People, States and Fear. An Agenda for International Security Studies in the Post-Cold Era*, Lynne Rienner: Boulder, 1991, p. 4.

⁵⁵ Keith Krause & Michael C. Williams, ‘Preface: Towards Critical Security Studies’, in: Keith Krause & Michael C. Williams (eds.) *Critical Security Studies. Concepts and Cases*. UCL Press: London, 1997, pp. vii-xxi, especially p. ix, italics in original.

⁵⁶ Buzan, *People, States and Fear*, 1991, p. 3.

⁵⁷ This phrasing derives from Keith Krause & Michael C. Williams, ‘Broadening the Agenda of Security Studies: Politics and Methods’, 1996, p. 247.

⁵⁸ Krause & Williams, ‘Broadening the Agenda of Security Studies: Politics and Methods’, 1996; Huysmans, *The Politics of Insecurity*, 2006, pp. 19-22.

amongst others, migration.⁵⁹ The second move is to 'deepen' the agenda of security studies, including non-state referent objects like individuals and society. The attempt to widen the threat-referent object matrix has met strong criticism. This critique concerns the fact that it views the threat-referent object matrix as encompassing too many different referent objects and threats.⁶⁰ The widening debate seems to be about adding adjectives to security (societal, environmental, etc.) without scrutinizing the meaning of the noun 'security' itself.⁶¹ Moreover, the widening debate has triggered a fierce reaction by scholars who defend the traditional interpretation of the threat-referent object matrix. These scholars submit that it is better to have a narrowly defined threat-referent object matrix than one which is too comprehensive. Indeed, as an advocate of the traditional approach argues, without a determinate definition of security the widening approach runs 'the risk of expanding "Security Studies" excessively' thereby endangering the discipline's 'intellectual coherence'.⁶²

Self-evidently, since the widening debate seeks to innovate the threat-referent object matrix, it also enforces this matrix. In this respect, the widening debate remains firmly within the bounds of the traditional approach. This seems to be the reason why the widening debate is considered to be an unsuccessful attempt 'to cut the Gordian knot' of security studies. A case in point is the argument that Barry Buzan develops in his *People, States and Fear*.⁶³ Recognizing that the traditional concept of security is too narrowly defined, Buzan aims to widen the traditional approach, yet at the same time wishes to maintain its main principles.⁶⁴ Consequently, at the very moment that Buzan opens up the traditional approach so as to include 'non-state units' and new 'sectors of threats', he sees himself compelled to reaffirm that the state remains the 'dominant unit', to privilege the concept of national security and to maintain the 'theoretical primacy' of military threats.⁶⁵

1.3.2 The Securitization Theory

The second contribution to the debate on the crisis of security studies that I want to discuss is the securitization theory of the so-called Copenhagen School. In order to resolve the crisis of security studies, the scholars associated with the Copenhagen School have appealed to the theory of language, building on the shift from a representational to a performative account of language.⁶⁶ The key idea of the securitization theory is that security should be conceptualized as a speech act.⁶⁷ By conceptualizing security in terms of a speech act, security is rendered as

⁵⁹ Ullman, 'Redefining Security', 1983.

⁶⁰ Buzan, Waever & De Wilde, *Security*, 1998, p. 2; Ole Waever, 'Securitization and Desecuritization', in: Ronnie D. Lipschutz (ed.) *On Security*, Columbia University Press: New York, 1995, pp. 46-86, especially pp. 47-54.

⁶¹ Jef Huysmans, 'Security! What Do You Mean? From Concept to Thick Signifier', *European Journal of International Relations*, vol. 4, no. 2, 1998, pp. 226-255, especially p. 227.

⁶² Walt, 'The Renaissance of Security Studies', 1991, p. 213.

⁶³ Buzan, *People, States and Fear*, 1991 (first published in 1983).

⁶⁴ Buzan, *People, States and Fear*, 1991, p. 20 ff.

⁶⁵ Buzan, *People, States and Fear*, 1991, p. 19, 133, 371.

⁶⁶ Jef Huysmans, 'Defining Social Constructivism in Security Studies: The Normative Dilemma of Writing Security', *Alternatives*, vol. 27, 2002, pp. 41-62, especially p. 45.

⁶⁷ Waever, 'Securitization and Desecuritization', 1995, p. 55; Buzan, Waever & De Wilde, *Security*, 1998, p. 26.

a 'self-referential practice'.⁶⁸ That is, the meaning of the concept of security lies in its usage,⁶⁹ implying that the security utterance is the 'primary reality' of security.⁷⁰ Crucially, the self-referentiality of security utterances means that 'there is no reference made to real existential threats existing independently of definitional practices'.⁷¹ An act of securitization does not imply the real existence of a threat but rather that the issue at hand is presented as an existential threat. Therefore, the 'nominalist'⁷² or 'linguistic'⁷³ turn in security studies brought about by the securitization theory implies a focus on the rhetoric of security, that is, the political construction of an issue as a security threat. What is essential to an act of securitization is its performativity. The security utterance creates something that didn't exist before. I will return to this aspect of performativity and its temporal structure later on, when dealing with the Foucaultian approach.

The focus on the rhetoric or political construction of security assumes that 'security is the move that takes politics beyond the established rules of the game and frames the issue either as a special kind of politics or as above politics'.⁷⁴ In other words, an act of securitization brings about the exceptionalization of an issue. An act of securitization comes about when a 'securitizing actor' utters a security speech act, proclaiming the presence of an existential threat to a referent object:

'when a securitizing actor uses a rhetoric of existential threat and thereby takes an issue out of what under those conditions is "normal politics", we have a case of securitization . . . A discourse that takes the form of representing something as an existential threat to a referent object does not by itself create securitization – this is a *securitizing move*, but the issue is securitized only if the audience accepts it as such'.⁷⁵

Thus, something can only be meaningfully designated as 'security issue' when a securitizing actor successfully mobilizes a discourse in which a referent object is existentially threatened, such as politicians who talk about immigration as a security threat.

Despite the shift from the reality of security to the language of security, the securitization theory still adheres to the traditional interpretation of the threat-referent object matrix. Actually, advocates of the securitization theory explicitly state that they aim to 'incorporate' the traditional position into their own theory.⁷⁶ First of all, this concerns the definition of the referent object. Despite distinguishing between a security referent and a securitizing actor, the

⁶⁸ Ole Waever, 'European Security Identities', *Journal of Common Market Studies*, vol. 34, no. 1, 1996, pp. 103-132, especially p. 107; Buzan, Waever & De Wilde, *Security*, 1998, p. 24.

⁶⁹ Waever, 'European Security Identities', 1996, p. 106.

⁷⁰ Buzan, Waever & De Wilde, *Security*, 1998, p. 26; Waever, 'Securitization and Desecuritization', 1995, p. 55.

⁷¹ Jef Huysman, 'Revisiting Copenhagen: Or, On the Creative Development of a Security Studies Agenda in Europe', *European Journal of International Relations*, vol. 4, no. 4, 1998, pp. 479-505, especially p. 493; also Huysmans, *The Politics of Insecurity*, 2006, p. 24.

⁷² Andrew Neal, *Exceptionalism and the Politics of Counter-Terrorism. Liberty, Security and the War on Terror*. Routledge: London/New York, 2010, p. 103.

⁷³ Huysmans, *The Politics of Insecurity*, 2006, p. 8.

⁷⁴ Buzan, Waever & De Wilde, *Security*, 1998, p. 23.

⁷⁵ Buzan, Waever & De Wilde, *Security*, 1998, p. 25, italics in original.

⁷⁶ Buzan, Waever & De Wilde, *Security*, 1998, p. 4.

securitization theory retains the notion of referent object to denote the security referent, which is defined as ‘things that are seen to be existentially threatened’.⁷⁷ Secondly, the securitization theory reaffirms that security is a ‘state-dominated field’, although this does not mean that it necessarily implies a ‘state-centered approach’.⁷⁸ Indeed, the securitization theory includes different levels of analysis, i.e. different kinds of ‘ontological referents’ (international system, units, individuals, etc.), and identifies a range of security sectors (military, political, economic, societal, environmental). Thirdly, the securitization theory takes over the ‘militaristic’ core of the traditional understanding of security. For an issue to be defined as security problem, it has to be framed as an ‘existential threat’ to a designated referent object, that is, a threat requiring emergency measures.⁷⁹

The critical purport of the securitization theory concerns the responsibility of securitizing actors talking about security.⁸⁰ These actors need some awareness of the fact that their words have the potential of securitizing an issue. In other words, treating something as a security issue implies a choice to do so, and this choice could have been made differently.⁸¹ In this respect, the securitization theory does not merely present an alternative approach to security but also proposes a particular ‘political ethic’.⁸² Considering that a successful act of securitization legitimizes the use of emergency measures to deal with that security issue, the representatives of the securitization theory argue that it is better to be sparing with security talk. Moreover, they propose to neutralize security issues and ‘de-securitize’ them, shifting security issues out of their emergency mode into the realm of normal politics.⁸³ In this respect, the securitization theory advocates a ‘negative agenda’⁸⁴ for security studies, ‘an agenda for minimizing security’.⁸⁵

1.3.3 Critical Security Studies

The third contribution to the debate on the crisis of security studies that I wish to discuss is critical security studies, which is actually less a defined approach than a movement initiating intellectual self-reflection among security scholars. Reflecting on the structural realist legacy of security studies, scholars have gathered to develop ‘a self-consciously critical perspective’.⁸⁶

⁷⁷ Buzan, Waever & De Wilde, *Security*, 1998, p. 36, my emphasis, MB.

⁷⁸ Buzan, Waever & De Wilde, *Security*, 1998, p. 37. ‘There is no literature, no philosophy, no tradition of “security” in non-state terms: it is only as a critical idea, played out against the concept and practices of state security, that other threats and referents have any meaning. An abstract idea of “security” is a nonanalytical term bearing little relation to the *concept* of security implied by national or state security . . . The *concept* of security refers to the state . . . “Security,” in other words, has to be read through the lens of *national security*’ (Waever, ‘Securitization and Desecuritization’, 1995, pp. 48–49, italics in original).

⁷⁹ Buzan, Waever & De Wilde, *Security*, 1998, p. 5, 21; Waever, ‘Securitization and Desecuritization’, 1995, p. 52, 54.

⁸⁰ Buzan, Waever & De Wilde, *Security*, 1998, p. 34.

⁸¹ Waever, ‘European Security Identities’, 1996, p. 108; also Krause & Williams, ‘Broadening the Agenda of Security Studies: Politics and Methods’, 1996, p. 247.

⁸² Michael C. Williams, ‘Words, Images, Enemies: Securitization and International Politics’, *International Studies Quarterly*, vol. 47, 2003, pp. 511–531, especially p. 524.

⁸³ Waever, ‘Securitization and Desecuritization’, 1995; Buzan, Waever & De Wilde, *Security*, 1998, p. 4.

⁸⁴ Waever, ‘Securitization and Desecuritization’, 1995, p. 57.

⁸⁵ Waever, ‘Securitization and Desecuritization’, 1995, p. 56.

⁸⁶ Krause & Williams, ‘Preface: Towards Critical Security Studies’, 1997, p. vii. The founding event of critical security studies was a conference in 1994 that resulted in the book Keith Krause & Michael C. Williams, *Critical Security Studies: Concepts and Cases*, UCL Press: London, 1997. This book continues to be the standard reference of critical security

The aim of critical security studies is to analyze the limitations of the traditional approach in order to open up possibilities for conceptual reorientation.⁸⁷ In so far that critical security studies entail a reflection on the traditional approach, they aren't so much representing a new theory,⁸⁸ as in the case of the securitization theory, but rather calling into question the traditional 'culture of inquiry'⁸⁹ of security studies. At the heart of critical security studies is a discomfort with the state-dominance and state-centrism of the traditional approach. For this reason, critical security studies is preoccupied with the notion of the referent object, both from an epistemological and a conceptual point of view.

As concerns the epistemological point, critical security studies criticize the objectivism of the traditional approach. As Krause and Williams notice, the 'claim to *know* objectively means that the discipline [i.e. security studies, MB] must treat the phenomena under consideration as given, unproblematic *objects*'.⁹⁰ However, treating something as an object presupposes a process of objectification, that is, a 'prior definition' of this object.⁹¹ This means that the notion of the referent object entails a constructivist element; the referent object is a theoretical construct.

From a conceptual point of view, critical security studies inquire why the traditional approach is so resistant to giving up its statist definition of the referent object. The reason for this seems to be that the traditional approach presupposes a particular conception of political order:

'Realists' accounts, for example, rest on a theory of domestic politics and defend a particular vision of the possibilities of political order – the political – that sees it as inextricable from the modern conceptions of sovereignty and the state. Its conception of security follows and is similarly derivative . . .'⁹²

Therefore, a critical account of the referent of security implies making explicit the problem of political order presumed by a conception of security. 'By making the definition of the *political* a question rather than an assumption, one can illuminate the dynamics of contemporary security debates . . .'⁹³ Put differently, the concept of security presupposes a prior understanding

studies, according to David Mutimer, 'Critical Security Studies: A Schismatic History', in: Alan Collins (ed.) *Contemporary Security Studies*, Oxford University Press: Oxford, 2010, pp. 84-105.

⁸⁷ Once again, my discussion of critical security studies is incomplete as I don't deal with the strand that is known as the 'Aberystwyth School'.

⁸⁸ 'Obviously, this book does not pretend to present a comprehensive overview of alternative approaches to security . . . While elements of many approaches may be found in this volume, no one perspective dominates' (Krause & Williams, 'Preface: Towards Critical Security Studies', 1997, p. viii-xv).

⁸⁹ Krause & Williams, 'Preface: Towards Critical Security Studies', 1997, p. xi.

⁹⁰ Krause & Williams, 'Broadening the Agenda of Security Studies: Politics and Methods', 1996, p. 233, italics in original.

⁹¹ Krause & Williams, 'Broadening the Agenda of Security Studies: Politics and Methods', 1996, p. 233.

⁹² Krause & Williams, 'Preface: Towards Critical Security Studies', 1997, p. x.

⁹³ Krause & Williams, 'Preface: Towards Critical Security Studies', 1997, pp. x-xii, italics in original.

of who or what is to be secured. As R.B.J. Walker formulates it, ‘the crucial subject of security is . . . the subject of security’.⁹⁴

As we will see, the approach within security studies that takes its cue from Foucault’s theory of governmentality builds on elements from the widening debate, the securitization theory and critical security studies. First of all, the Foucaultian approach deems it necessary to ‘broaden’ and ‘deepen’ the threat-referent object matrix. Secondly, it takes over the notion of securitization, in the Schmittian sense of exceptionalization.⁹⁵ And thirdly, the Foucaultian approach can be labelled as a critical approach in that it seeks to disclose the constructivist nature of the threat-referent object matrix.

1.4 The Foucaultian Approach

Drawing on other contributions that have sought to resolve the crisis of security studies, some scholars have appealed to Foucault’s theory of governmentality. My analysis of what I will denote as the Foucaultian approach will be limited to the work of two scholars in particular: Didier Bigo and Jef Huysmans.⁹⁶ These scholars develop a theory of security ‘in extension of Michel Foucault’s work’⁹⁷ on governmentality; they adopt a ‘Foucaultian lens’⁹⁸ in order to redefine the subject matter of security studies. Drawing on Foucault, Bigo and Huysmans adopt what we could call a discursive conception of security. Bigo and Huysmans develop their respective notions of security in relation to the same problem, namely, immigration in the context of the European Union. Yet, notwithstanding the correlation between the work of Bigo and Huysmans, let there be no misunderstanding that I construe their work in terms of the Foucaultian approach. In my view, despite significant differences Bigo and Huysmans share a common theoretical basis. The fact that Bigo and Huysmans draw on Foucault’s concept of governmentality does not mean that they use it strictly in the sense that Foucault has defined it. Actually, I will elaborate Foucault’s own definition of the concept of governmentality in the next section, not so much to distinguish Foucault’s theory of governmentality from the Foucaultian approach, but rather to explicate the implications of the latter’s solution to the problem of the security referent.

⁹⁴ R.B.J. Walker, ‘The Subject of Security’, in Keith Krause & Michael C. Williams (eds.), *Critical Security Studies. Concepts and Cases*. London: UCL Press, 1997, pp. 61-81, especially p. 68.

⁹⁵ Williams argues that the concept of securitization shows strong similarities with Schmitt’s concept of the political. Actually, he submits that ‘securitization is the Schmittian realm of the political, and for precisely this reason it is dangerous and – by and large – to be avoided’ (Williams, ‘Words, Images, Enemies: Securitization and International Politics’, 2003, p. 523). On the Schmittian legacy of the securitization theory, see also Neal, *Exceptionalism and the Politics of Counter-Terrorism*, 2010 and Filip Ejdus, ‘Dangerous Liaisons: Securitization Theory and Schmittian Legacy’, *Western Balkans Security Observer*, no. 13, 2009, pp. 9-16.

⁹⁶ Whereas Didier Bigo is a representative of the so-called Paris School of security studies, Huysmans’ work ‘can be read as a critical dialogue between the Copenhagen School and the Paris School of security’ (Rens van Munster, ‘Security as a Shoestring: A Hitchhiker’s Guide to Critical Schools of Security in Europe’, *Cooperation and Conflict: Journal of the Nordic International Studies Association*, vol. 42, no. 2, 2007, pp. 235-243, especially p. 239).

⁹⁷ Didier Bigo, ‘Security and Immigration: Toward a Critique of the Governmentality of Unease’, *Alternatives*, vol. 27, 2002, pp. 63-92, especially p. 81.

⁹⁸ Huysmans, *The Politics of Insecurity*, 2006, p. 31.

1.4.1 Security Framing

The Foucaultian approach revolves around the conception of security as a ‘technique of government’.⁹⁹ The central idea is that a response to a threat presupposes that an issue is framed as a security problem. Security framing implies that a threat is socially and politically constructed, and not an objective condition. Now, techniques of government produce insecurity insofar as they frame an issue as a security problem. In fact, the production of insecurity is what Huysmans calls the ‘constitutive dimension’ of security framing. For if the referent is conceived as being threatened, security framing renders it as ‘that what needs securing’,¹⁰⁰ and hence as insecure. Reflecting on both the threat definition and the security referent, we could say that the Foucaultian approach further pursues the deconstruction of the threat-referent object matrix as initiated by the securitization theory. Whereas the securitization theory focuses on the construction of *threats*, the Foucaultian approach also draws attention to the constructed nature of the *security referent*.

Besides its more radical reconsideration of the threat-referent object matrix, the Foucaultian approach can be distinguished from the securitization theory in that it redefines the concept of securitization. An act of securitization does not stand on its own but is part of a broader process of security framing. Whereas the concept of securitization, in its initial definition, is confined to the performativity of security language, the notion of security framing draws attention to the institutional, technological and technocratic processes that form the background of the security statement. As Bigo submits, ‘there is no process of securitisation independent of a field of security constituted by groups and institutions that authorize themselves and that are authorized to state what is security’.¹⁰¹ This suggests that the knowledge and technological instruments like databases, i.e. what Bigo calls the ‘field of security’,¹⁰² that are used for the definition of a threat, should be taken into account.¹⁰³ So, it is not sufficient to analyze the security utterance on its own. We should also pay attention to the ‘power position’ of the securitizing actor.¹⁰⁴ Consequently, if the definition of security as a speech act represents the ‘linguistic turn’ in security studies,¹⁰⁵ the definition of security as technique of government represents the ‘discursive’ turn in security studies, taking into account the underlying institutional, technological and bureaucratic structures of security utterances.

⁹⁹ Didier Bigo, ‘When two become one: internal and external securitizations in Europe’, in: Morten Kelstrup & Michael C. Williams, *International Relations Theory and the Politics of European Integration. Power, Security and Community*. London/New York: Routledge, 2000, pp. 171–204, especially p. 176; Huysmans, *The Politics of Insecurity*, 2006, p. 6.

¹⁰⁰ Huysmans, *The Politics of Insecurity*, 2006, p. 52.

¹⁰¹ Bigo, ‘When two become one’, 2000, p. 195.

¹⁰² Bigo, ‘When two become one’, 2000, pp. 196–197.

¹⁰³ ‘Securitisation rests on the capacity of actors to constitute statistics about their aim and under their own categories, to put them in series, to be able to submit them to examination, to protocols of research, with empirical checks, in short, to produce “a truth” on these statements’ (Bigo 2000, p. 195).

¹⁰⁴ Bigo, ‘Security and Immigration’, 2002, p. 74. In this regard, see also Didier Bigo, *Polices en réseaux. L’expérience européenne*. Presses de la Fondation Nationale des Sciences Politiques, 1996.

¹⁰⁵ Huysmans, *The Politics of Insecurity*, 2006, p. 8, 24.

1.4.2 Identity Politics

Besides the notion of securitization, there is another continuity between the securitization theory and the Foucaultian approach, which goes back to the traditional approach, namely, the basic understanding of security as an exceptional problem that relates to the problem of existence/non-existence. By framing an issue as a security problem, it is given an exceptional status that overrules the realm of normal politics. Linking up with the securitization theory, Huysmans seeks to make explicit the Schmittian roots of the traditional understanding of security. In Huysmans' view, Schmitt's existential politics represents in a paradigmatic way the 'political rationality' or 'logic of political identification' implicit in security framing.¹⁰⁶ In a nutshell, 'in its constitutive Schmittian rendering, securitization . . . refers to a political technique (i.e. a method of doing politics) with a capacity to politically integrate a society by staging a credible existential threat in the form of an enemy'.¹⁰⁷ Now, in so far that the manifestation of an enemy implies a disruption of normal politics, it creates an emergency situation that requires 'exceptional political action to assure the survival of the community'.¹⁰⁸ Therefore, security framing suggests that it is necessary to make a move from normal to exceptional politics in order to respond to an existential threat.¹⁰⁹

According to Huysmans, the snag is that in Schmitt's interpretation of politics the enemy is constitutive of the identity of a community. In a Schmittian understanding, Huysmans argues, exceptional politics reveals the authentic identity of a community; normal politics concerns the realm of inauthenticity. The problem is that the Schmittian logic entails a peculiar 'political dialectic': securitization 'is a peculiar process of constituting a political community of the established that seeks to secure unity and identity by instituting existential insecurity'.¹¹⁰ This means that the existence of a political community as an autonomous unity requires that it should first be freed from existential threats. Paradoxically, in order to free itself from existential danger, a community should first securitize the issue at hand, implying that it has to reiterate its insecure existence. In other words, the Schmittian political rationality of security framing implies a vicious circle in that the quest for security boils down to an intensification and reproduction of insecurity. Importantly, security framing places the unity and identity of a political community beyond doubt. That is, the very framing itself of an issue as a security problem shields the political community's autonomy and unity from being called into question.¹¹¹

1.4.3 Immigration

The definition of security advocated by the Foucaultian approach is elaborated in relation to one issue in particular: immigration. According to Huysmans, the securitization of immigration

¹⁰⁶ Huysmans, *The Politics of Insecurity*, 2006, p. 130.

¹⁰⁷ Huysmans, *The Politics of Insecurity*, 2006, p. 130.

¹⁰⁸ Huysmans, *The Politics of Insecurity*, 2006, p. 133.

¹⁰⁹ Huysmans, *The Politics of Insecurity*, 2006, p. 135.

¹¹⁰ Huysmans, *The Politics of Insecurity*, 2006, p. 47.

¹¹¹ Huysmans, *The Politics of Insecurity*, 2006, p. 49.

is a 'political act', and not simply a matter of law enforcement.¹¹² That is to say, the framing of immigration as a security problem enables the 'mobilization' of political responses.¹¹³ In this sense, a security response assumes that immigration is raised from a source of unease to the level of a collective threat. The definition of immigration as a threat to the unity and identity of a political community seems to necessitate 'exceptional measures beyond the normal demands of everyday politics'.¹¹⁴ Bigo emphasizes that the problem of the securitization of immigration does not so much concern the legal status of immigrants. Rather, it concerns the social and political image that is constructed by politicians, security professionals and others.¹¹⁵

Importantly, the securitization of immigration does not only mean that immigrants are framed as an existential threat to political community, it also invokes a particular image of political community, to wit 'an image of a completed, harmonious unit that only seems to be experiencing conflict, disintegration, or violence if external factors such as migration, start disrupting it'.¹¹⁶ As a consequence, in as much as the definition of immigration as a threat is a social construction, this also holds for the image of the political community. Bigo states this in no uncertain terms: 'the framing of the state as a body endangered by migrants is a political narrative activated for the purpose of political games . . .'.¹¹⁷ As he continues, 'politicians live in the myths about polity, sovereignty, and state. They participate in the illusion of the political field. These myths structure their space, their way of thinking and acting concerning a "political problem" . . .'.¹¹⁸ So, once again, not only the threat is a construct, but also the security referent. As Huysmans argues, 'securitizing migration makes immigrants, refugees and asylum-seekers both an index of fear and a vehicle for inscribing fear as a political currency and an organizing principle in social and political relations'.¹¹⁹

1.4.4 De-Securitization

What strategy does the Foucaultian approach propose to counteract the securitization of issues such as immigration? In line with the securitization theory, Huysmans labels this critical strategy de-securitization. According to him, de-securitization is a strategy to neutralize 'the exceptional political status of security questions', making these questions appear 'as problems similar to all problems a political community has to deal with'.¹²⁰ For example, de-securitization by means of framing immigration in economic or human rights terms. If securitization is a strategy to exceptionalize an issue, de-securitization implies 'de-dramatizing' it.¹²¹ In this regard, Huysmans coins an interesting turn of phrase. At bottom, he submits, de-securitization is

¹¹² Huysmans, *The Politics of Insecurity*, 2006, p. 50; see also Jef Huysmans, 'Migrants as a security problem: dangers of "securitizing" societal issues', in R. Miles & D. Thranhardt (eds.), *Migration and European Integration. The Dynamics of Inclusion and Exclusion*, Pinter: London, 1995, pp. 53-72.

¹¹³ Bigo, 'Security and Immigration', 2002, p. 71.

¹¹⁴ Bigo, 'Security and Immigration', 2002, p. 64.

¹¹⁵ Bigo, 'Security and Immigration', 2002, p. 71.

¹¹⁶ Huysmans, *The Politics of Insecurity*, 2006, p. 49.

¹¹⁷ Bigo, 'Security and Immigration', 2002, p. 68.

¹¹⁸ Bigo, 'Security and Immigration', 2002, p. 69.

¹¹⁹ Huysmans, *The Politics of Insecurity*, 2006, p. 61.

¹²⁰ Huysmans, *The Politics of Insecurity*, 2006, p. 143.

¹²¹ Huysmans, *The Politics of Insecurity*, 2006, p. 158.

about ‘normalizing insecurities’.¹²² In other words, insecurity should not be perceived as something exceptional but rather as something that is part of everyday life, part of normal order.

I think that Huysmans touches here on an important point: the exceptional manifestation of insecurity finds its place besides normal manifestations thereof. However, the question then is what the normal manifestation of insecurity entails and how to distinguish between normal and exceptional forms of insecurity. Despite broaching this point, Huysmans does not explicate what normal insecurity means and how it can be distinguished from exceptional manifestations of insecurity. In the following chapters I will further pursue the problem of normal insecurity. What I will take from Huysmans is that the preoccupation with the exceptional character of insecurity blocks a full understanding of the phenomenon of insecurity and hence also of the possibilities available to respond to threats.

By defining security as a technique of government, the Foucaultian approach marks the culmination of a critical reflection on the traditional conceptual framework of security studies that runs from the widening debate to the securitization theory and critical security studies. For the Foucaultian approach does not only view the threat as social construction, like the securitization theory, but also as the referent object. The subject of security is a social construction, or so the Foucaultian approach argues. But what remains of security studies after the deconstruction of the threat-referent object matrix? The radical constructivism of the Foucaultian approach seems to imply a negative and skeptical approach: a threat is a dangerous illusion rather than an objective condition; the referent of security is a socially constructed image rather than an object. This means that, as Loader and Walker formulate it, ‘there is, on this view, little or no mileage in seeking to think in constructive terms about the good of security and the kind of good that security is’.¹²³ Therefore, since it appears that the constructivism of the Foucaultian approach is but the reverse of the objectivism of the traditional approach, it remains the question whether the Foucaultian approach really succeeds in resolving the crisis of security studies.

1.5 Foucault’s Theory of Governmentality

The aim of this section is to further inquire into the negative and skeptical nature of the Foucaultian approach by focusing on its philosophical underpinnings. For this purpose I will examine Foucault’s theory of governmentality. First, I focus on Foucault’s methodology and the ontological status that he assigns to the ‘security referent’ as security scholars term it, i.e. the object of governmental techniques. Then, after having introduced governmentality as a distinct form of power besides law and discipline, I discuss Foucault’s definition of the notions of security, territory and population, which are the three concepts included in the initial title of Foucault’s course on governmentality at the *Collège de France*.¹²⁴ This implies that I will not

¹²² Huysmans, *The Politics of Insecurity*, 2006, p. 158.

¹²³ Loader & Walker, *Civilizing Security*, 2007, p. 14.

¹²⁴ As Foucault admits in one of his lectures, ‘basically, if I had wanted to give the lectures I am giving this year a more exact title, I certainly would not have chosen “security, territory, population”. What I would really like to undertake is something that I would call a history of “governmentality”’ (Michel Foucault, *Security, Territory, Population. Lectures at the Collège de France 1977 – 1978*, trans. Graham Burchell, Palgrave Macmillan: Basingstoke, 2007, p. 108).

engage in an analysis of the degree to which the Foucaultian approach remains faithful to Foucault's theory of governmentality. Rather, the following discussion of Foucault's theory of governmentality is instrumental to examining the constructivism of the Foucaultian approach, in particular to analyzing the notion of existence pertaining to a collective as a discursive unity.

1.5.1 Discourse Analysis

Clearly, the Foucaultian approach builds on Foucault's methodology: discourse analysis. In this respect, the conception of security as a technique of government represents what we could call a discursive conception. Foucault defines the notion of discourse in *The Archeology of Knowledge* in the following way:

'We shall call discourse a group of statements in so far as they belong to the same discursive formation . . . it is made up of a limited number of statements for which a group of conditions of existence can be defined. Discourse in this sense is . . . from beginning to end, historical – a fragment of history, a unity and discontinuity in history itself, posing the problem of its own limits, its divisions, its transformations, the specific modes of its temporality . . .'¹²⁵

First of all, Foucault's definition makes clear that discourse is about statements (*énoncé*); a statement is the basic unit of discourse. In fact, this emphasis distinguishes Foucault's definition of discourse from both formal-linguistic and empirical-sociological accounts thereof.¹²⁶ Whereas the latter two concentrate on enunciations (*énonciation*), the former focuses on discourses at the level of the enounced, that is, the positivity of statements. Importantly, Foucault's shift to statements implies a rejection of the idea of 'a sovereign subject'.¹²⁷ As Gilles Deleuze clarifies, Foucault challenges the idea of a 'subject of enunciation who seemingly has the power to begin a discourse' involving 'a linguistic "I" that cannot be reduced to "he" . . . since it sets things into motion or is self-referential'.¹²⁸ Indeed, this is at stake in Foucault's definition of discourse: showing that the first-person perspective of a subject is a dependent effect of discourse. 'The subject . . . has the character of a *first person* with whom discourse begins, while the statement is an anonymous function which leaves a trace of subject only in the *third person*, as a derived function'.¹²⁹

The shift from enunciations to statements implies that Foucault concentrates on the positive existence of statements, more precisely, the positivity of a group of statements as a discursive formation. That is, Foucault aims to analyze 'the law of *existence* of statements, that which rendered them possible – them and none other in their place: the conditions of their

¹²⁵ Michel Foucault, *The Archeology of Knowledge*, trans. A.M. Sheridan Smith, Pantheon Books: New York, 1972, p. 117.

¹²⁶ Alec McHoul & Wendy Grace, *A Foucault Primer: Discourse, Power and the Subject*, UCL Press: London, 1995, pp. 26-56.

¹²⁷ Michel Foucault, 'Politics and the study of discourse', in Graham Burchell, Colin Gordon & Peter Miller, *The Foucault Effect. Studies in Governmentality*, University of Chicago Press: Chicago, 1991, pp. 53-73, especially p. 61.

¹²⁸ Gilles Deleuze, *Foucault*, trans. Séan Hand, Continuum: London/New York, 2006, p. 7.

¹²⁹ Deleuze, *Foucault*, 2006, p. 14, emphasis added, MB.

singular emergence . . .¹³⁰ Rather than focusing on enunciations, i.e. on what is said, Foucault is interested in the limits of what can be said within the bounds of a discourse.¹³¹ By studying the ‘conditions of existence’¹³² of statements, Foucault seeks to disclose the conditions of discourse, that is, the relations between ‘institutions, economic and social processes, behavioural patterns, systems of norms, techniques, types of classification, modes of characterization’ that define discourse as a practice.¹³³ The condition of discourse is what Foucault calls a historical *a priori*. As ‘a condition of the reality for statements’, the historical *a priori* concerns a set of historically determined rules that characterizes a discursive practice.¹³⁴

The overarching aim of Foucault’s discourse analysis is to demonstrate what he calls the synthetic nature of discursive formations.¹³⁵ For to the extent that Foucault defines discourse in terms of a conglomerate of a multiplicity of statements, the unity of discourse is necessarily synthetic. Therefore, discourse lacks an ‘immediate’ and ‘homogenous’ unity.¹³⁶ The ‘variable and relative’ character of discursive unity has important implications with respect to the identity of discursive formations. According to Foucault, essential to the prevailing understanding of identity is the idea of permanence in time or sameness.¹³⁷ However, by focusing on continuity, Foucault argues, the prevailing understanding ignores the phenomenon of discontinuity. Actually, if identity is interpreted as sameness, its temporal permanence is hypostatized. Yet, to the extent that, as Foucault argues, the ‘pre-existing forms of continuity’ that a discursive formation is considered to possess is ‘the result of a construction’, discourse analysis demands renouncing the hypostatization of identity.¹³⁸ For the unity of a discursive formation only appears as such in the sense of ‘a retrospective regrouping’.¹³⁹ As a consequence, Foucault claims that essential to discursive formations is ‘their non-identity through time’, that is, ‘the internal discontinuity that suspends their permanence’.¹⁴⁰ In other words, discourse analysis, in Foucault’s sense of the expression, desires to dispense with identity, understood as sameness, in order to secure difference, to exchange homogeneity for heterogeneity, continuity for discontinuity, and permanence for rupture.

1.5.2 Faceless Potentiality

Foucault’s definition of discursive identity implies a thesis about the ontological status of things. Paul Veyne deals with this issue in his article entitled ‘Foucault Revolutionizes History’.¹⁴¹ Analyzing Foucault’s methodology, Veyne discusses its underlying account of the

¹³⁰ Foucault, ‘Politics and the study of discourse’, 1991, p. 59, italics in original.

¹³¹ See in particular Foucault, ‘Politics and the study of discourse’, 1991, p. 59 ff.

¹³² Foucault, *The Archeology of Knowledge*, 1972, p. 28.

¹³³ Foucault, *The Archeology of Knowledge*, 1972, p. 46.

¹³⁴ Foucault, *The Archeology of Knowledge*, 1972, p. 127.

¹³⁵ Foucault, *The Archeology of Knowledge*, 1972, p. 26.

¹³⁶ Foucault, *The Archeology of Knowledge*, 1972, p. 24.

¹³⁷ Foucault, *The Archeology of Knowledge*, 1972, p. 21.

¹³⁸ Foucault, *The Archeology of Knowledge*, 1972, p. 29.

¹³⁹ Foucault, *The Archeology of Knowledge*, 1972, p. 31.

¹⁴⁰ Foucault, *The Archeology of Knowledge*, 1972, p. 33.

¹⁴¹ Paul Veyne, ‘Foucault Revolutionizes History’, trans. C. Porter, in: A.I. Davidson (ed.), *Foucault and his interlocutors*, The University of Chicago Press: Chicago, 1997, pp. 146-182.

mode of being of what he calls ‘natural objects’. According to Veyne, key to Foucault’s methodology is the principle of ‘objectivization’.¹⁴² A discursive formation cannot be said to have natural existence, to have independent existence as an object outside of discourse. Instead, ‘things, objects, are only correlatives of practices’.¹⁴³ The process of objectivization entails that a prediscursive referent comes to appear *as* something, *as* an object through discourse. This means that prior to its objectivization, the prediscursive referent has ‘a faceless, not yet objectivized existence’.¹⁴⁴ Indeed, the prediscursive referent does not exist as a natural object but appears ‘retrospectively’ as such.¹⁴⁵ Therefore, in Veyne’s interpretation, the central problem for Foucault is the reification of the prediscursive referent, the fact that we treat it as having an objective mode of being.¹⁴⁶

According to Veyne, Foucault’s understanding of identity is based on an ontology of potentiality. That is, the prediscursive referent exists as potentiality and its objectivization is only a possible actualization. In this respect, Foucault’s account of the mode of being of natural objects challenges the prevailing thesis about the ontological status of objects which claims that objects have a ‘changeless face’.¹⁴⁷ In Veyne’s interpretation, Foucault claims that a prediscursive referent exists as ‘faceless potentiality’, a potentiality that is actualized in a determinate way.¹⁴⁸ Hence, discursive identity is an actualization that is by no means the only possible one. Put differently, discursive practices give the prediscursive referents their ‘objective faces’,¹⁴⁹ that is, actualizes their potentiality. It is for this reason that Foucault emphasizes the temporal structure of discursive formations. According to Foucault, we should hold the discursive identity of a referent in suspense, ‘depresentifying’ its existence as he calls it.¹⁵⁰ Or, as Veyne puts it, ‘the prediscursive referent *is not* a natural object’¹⁵¹, it can only be considered to exist as such retrospectively.

The ontology implied by Foucault’s discourse analysis is quite radical. For the ‘depresentification’ of things means substituting ‘the enigmatic treasure of “things” anterior to discourse’ for ‘the regular formation of objects only in discourse’.¹⁵² This is in fact, according to Veyne, Foucault’s ‘most original thesis’: Although Foucault seeks to explain ‘what is made’, i.e. a discursive formation, on the basis of ‘what went into its making at each moment of history’, it would be wrong of us to explain ‘the making, the practice’ on the basis of ‘what is made’.¹⁵³ This means that while it is insightful to make a distinction between a prediscursive referent and the discursive formation, as Veyne does, for Foucault the starting point is the

¹⁴² ‘The method thus consist, for Foucault, in understanding that things are only objectivizations of determined practices and that the determinations must be brought to light, since consciousness fails to conceptualize them’ (Veyne, ‘Foucault Revolutionizes History’ 1997, p. 159).

¹⁴³ Veyne, ‘Foucault Revolutionizes History’, 1997, p. 160.

¹⁴⁴ Veyne, ‘Foucault Revolutionizes History’, 1997, p. 170.

¹⁴⁵ Veyne, ‘Foucault Revolutionizes History’, 1997, p. 170.

¹⁴⁶ Veyne, ‘Foucault Revolutionizes History’, 1997, p. 161.

¹⁴⁷ Veyne, ‘Foucault Revolutionizes History’, 1997, p. 171.

¹⁴⁸ Veyne, ‘Foucault Revolutionizes History’, 1997, p. 171.

¹⁴⁹ Veyne, ‘Foucault Revolutionizes History’, 1997, p. 177.

¹⁵⁰ Foucault, *The Archeology of Knowledge*, 1972, p. 47.

¹⁵¹ Veyne, ‘Foucault Revolutionizes History’, 1997, p. 170, italics in original.

¹⁵² Foucault, *The Archeology of Knowledge*, 1972, p. 47.

¹⁵³ Veyne, ‘Foucault Revolutionizes History’, 1997, pp. 160-161.

positivity of the discursive formation. In other words, there is no access to a prediscursive referent other than through discourse. Moreover, as Deleuze notes, for Foucault ‘no sense of possibility or potentiality exists in the realm of statements. Everything in them is real and reality is manifestly present’.¹⁵⁴ Accordingly, in Foucault’s view, there is an insurmountable fissure between discourse and what precedes it, between actuality and potentiality.

Foucault develops his account of the relation between potentiality and actuality on the basis of the distinction between the ‘material’ and the ‘discursive unity’ of a thing.¹⁵⁵ In his view, a prediscursive referent exists as materiality. According to Veyne, as a material unity the prediscursive referent has only a ‘phantom existence’ as ‘unrealized potentiality’.¹⁵⁶ In other words, Foucault defines the existence of prediscursive referents in terms of a ‘material universe’ of potentiality.¹⁵⁷ Now, it is crucial, as Veyne explains, that this material universe is, as potentiality, in act.¹⁵⁸ However, being in act, the material universe is the act of nothing. In this sense, Foucault understands the world to exist in the following sense: ‘a faceless and perpetually agitated matter brings into being on its surface, at constantly shifting points, faces that are always different and that do not exist, in which everything is individual, so much so that nothing is’.¹⁵⁹ So, if Foucault’s argument is essentially about the rejection of the reified existence of discursive formations, this does not mean that he claims that they are nothing. This seems in fact to be the whole problem with which Foucault is struggling: to the extent that a discursive formation is the correlative of a practice, it is neither something nor nothing.¹⁶⁰ Not something, some-*thing*, since the discursive formation cannot be said to have existence prior to discourse. Not nothing, in so far that the referent exists as an objectivization, i.e. as actualized potentiality.

¹⁵⁴ Deleuze, *Foucault*, 2006, p. 4.

¹⁵⁵ Foucault, *The Archeology of Knowledge*, 1972, p. 23 ff.

¹⁵⁶ Veyne, ‘Foucault Revolutionizes History’, 1997, p. 164.

¹⁵⁷ Veyne, ‘Foucault Revolutionizes History’, 1997, p. 170.

¹⁵⁸ Veyne, ‘Foucault Revolutionizes History’, 1997, p. 169, 179.

¹⁵⁹ Veyne, ‘Foucault Revolutionizes History’, 1997, p. 182. For a recent defense of this account of identity, see Serge Gutwirth, ‘Beyond Identity?’, *Identity in the Information Society*, vol. 1, 2008, pp. 123–133, especially p. 128.

¹⁶⁰ In this regard, Veyne argues that Foucault’s main discussion partner is phenomenology (see in particular Veyne, ‘Foucault Revolutionizes History’, 1997, pp. 169–170, 179). Veyne demonstrates this with the problem of madness. According to Veyne, for Foucault madness does not exist. In fact, for Foucault ‘the material of madness (behavior, neuromicrobiology) really exists, but not as madness; to be mad only materially is precisely not yet to be mad. A man must be objectivized as a madmen for the prediscursive referent to appear retrospectively as material for *madness*’ (Veyne, ‘Foucault Revolutionizes History’, 1997, p. 170, italics in original). As reported in Veyne’s article, Foucault has responded to this discussion of the ontological status of madness as follows: “I personally have never written that *madness does not exist*, but it can be written; for phenomenology, madness exists, but it is not a thing, whereas one has to say on the contrary that madness does not exist, but that it is not therefore nothing” (Veyne, ‘Foucault Revolutionizes History’ 1997, p. 170, italics in original). Foucault returns to his statement in the lecture of 10 January 1979 of the course ‘The Birth of Biopolitics’: ‘My reasoning, my method, was not to examine whether history gives me or refers me to something like madness, and then to conclude, no, it does not, therefore madness does not exist . . . The method consisted in saying: Let’s suppose that madness does not exist. If we suppose that it does not exist, then what can history make of these different events and practices which are apparently organized around something that is supposed to be madness?’ (Michel Foucault, *The Birth of Biopolitics. Lectures at the Collège de France 1978 – 1979*, trans. Graham Burchell, Palgrave Macmillan: Basingstoke, 2008, p. 3).

1.5.3 The Triangle Law – Discipline – Governmentality

The methodology that Foucault adopts informs his analysis of governmentality. In order to demonstrate this I discuss three key concepts of governmentality, to wit security, territory and population.¹⁶¹ Indeed, Foucault's discussion of these concepts assumes what Deleuze would call a third-person perspective. Yet, before zooming in on these concepts, let me first say a few words about the concept of governmentality.

The occasion for inventing the 'ugly word "governmentality"'¹⁶² is Foucault's analysis of bio-power, a topic that aroused his interest after publishing *Discipline and Punish*, Foucault's book on disciplinary power. Foucault introduces the notion of bio-power or bio-politics in *The History of Sexuality* and the lecture of 17 March 1976 of the course "*Society Must Be Defended*" at the *Collège de France* to demarcate a form of power besides law and discipline that is directed at the biological existence of human beings.¹⁶³ To the extent that bio-power deploys security mechanisms to control the biological condition of a population, Foucault's initial focus on bio-power shifts a little to the rationality of governing, at least in the two courses that Foucault taught at the *Collège de France* between 1978 and 1979.¹⁶⁴ This shift led Foucault to introduce the concept of governmentality, which he defines as follows: 'the ensemble formed by institutions, procedures, analyses and reflections, calculations, and tactics that allow the exercise of this very specific, albeit very complex, power that has the population as its target, political economy as its major form of knowledge, and apparatuses of security as its essential technical instrument'.¹⁶⁵

Foucault distinguishes governmentality as a form of power from law and discipline. In a general sense, Foucault discerns two characteristics on the basis of which law, discipline and governmentality can be identified as distinct forms of power. The first characteristic that enables us to distinguish between law, discipline and governmentality is that they have a different object of power. Law targets legal subjects, discipline the bodies of individuals, and governmentality the whole of a population in the sense of the multiplicity of individuals constituted as a collective. The second characteristic concerns the techniques of power. Law operates mainly on the basis of mechanisms of punishment, discipline with techniques of surveillance and correction, and governmental power is exercised by means of security mechanisms.

An important characteristic of these techniques of power is the process of normalization. According to Foucault, the notion of normality as it functions in the governmental

¹⁶¹ I leave aside the reception of Foucault's concept of governmentality by the so-called 'Anglo-neo Foucaultian' branch of 'governmentality studies' represented by authors such as Peter Miller, Nikolas Rose, Colin Gordon and Mitchell Dean. I am interested in Foucault's analysis of governmentality, and not what 'governmentality scholars' have made of it.

¹⁶² Foucault, *Security, Territory, Population*, 2007, p. 115.

¹⁶³ Michel Foucault, *The History of Sexuality. Volume I: An Introduction*, trans. Robert Hurley, Pantheon Books: New York, 1978, especially pp. 133-159 ('Part Five: Right of Death and Power over Life') and "*Society Must Be Defended*". *Lectures at the Collège de France 1975 – 1976*, trans. David Macey, Picador: New York, 2003, especially pp. 239-264 (lecture 11 of 17 March 1976).

¹⁶⁴ See Foucault, *Security, Territory, Population*, 2007 and *The Birth of Biopolitics*, 2008.

¹⁶⁵ Foucault, *Security, Territory, Population*, 2007, p. 108. For a detailed analysis of Foucault's concept of governmentality, see Thomas Lemke, *Eine Kritik der politischen Vernunft. Foucaults Analyse der modernen Gouvernementalität*, Argument Verlag: Hamburg, 1997.

form of power is completely different from those of the legal and disciplinary form of power. As regards the legal form of power, normality concerns the ‘normativity intrinsic to the law’.¹⁶⁶ In this sense, legal sanctions are a form of normalization, that is, of making behavior conform with the law. Disciplinary power on the other hand posits an ‘optimal model’ that functions as the norm to distinguish between normality and abnormality.¹⁶⁷ Hence, disciplinary techniques are means of ‘normation’, of making the individuals fit into the optimal model.¹⁶⁸ In contrast to the legal and disciplinary form of power, governmentality lacks a pre-set definition of normality, i.e. a norm that defines normality and that enables us to distinguish between normality and abnormality. Instead, what is defined as normal in the context of the governmental form of power is the outcome of ‘an interplay between different distributions of normality’,¹⁶⁹ i.e. a ‘general curve’.¹⁷⁰ This means that, as Foucault puts it, ‘the norm is an interplay of differential normalities. The normal comes first and the norm is deduced from it . . .’¹⁷¹ In other words, normality is a construction.

Foucault’s demarcation of law, discipline and governmentality as distinctive forms of power raises the question how they relate to one another. The first answer to this question is historical. According to Foucault, it is possible to categorize the forms of power historically. On the basis of Foucault’s historical schematization, we could say that law is the first dominant form of power.¹⁷² Subsequently, law diminishes as the dominant form of power and is overtaken by discipline.¹⁷³ And after the period characterized by discipline, governmentality becomes the dominant form of power.¹⁷⁴ To be sure, in Foucault’s interpretation, all three forms of power are always at work in a given historical period but only one of them gains dominance. ‘So we should not see things as the replacement of a society of sovereignty by a society of discipline, and then of a society of discipline by a society, say of government. In fact, we have a triangle: sovereignty, discipline, and governmental management . . .’¹⁷⁵

In so far as the three forms of power are always operative simultaneously, the historical answer to the question about their interrelation also seems to demand a systematic answer. Admittedly, Foucault does not seem to provide a univocal answer to the systematic relation between law, discipline and governmentality. Yet, Foucault’s lectures of the course ‘Security, Territory, Population’ seem to contain some clues about the systematic relation between the three forms of power. My hypothesis is that, at least on the basis of the course ‘Security, Territory, Population’, Foucault’s analysis of discipline and governmentality revolves around the idea that law is not the sole form of power but that it is accompanied by other forms,

¹⁶⁶ Foucault, *Security, Territory, Population*, 2007, p. 56. Interestingly, Foucault refers in this respect to the legal theory of Hans Kelsen.

¹⁶⁷ Foucault, *Security, Territory, Population*, 2007, p. 57.

¹⁶⁸ Foucault, *Security, Territory, Population*, 2007, p. 57.

¹⁶⁹ Foucault, *Security, Territory, Population*, 2007, p. 63.

¹⁷⁰ Foucault, *Security, Territory, Population*, 2007, p. 62.

¹⁷¹ Foucault, *Security, Territory, Population*, 2007, p. 63.

¹⁷² See Foucault, “*Society Must Be Defended*”, 2003, pp. 43–64 for a concise account of his interpretation of the legal form of power.

¹⁷³ Michel Foucault, *Surveiller et punir: naissance de la prison*, Gallimard: Paris, 1975.

¹⁷⁴ Foucault, *Security, Territory, Population*, 2007, pp. 108–109.

¹⁷⁵ Foucault, *Security, Territory, Population*, 2007, p. 107.

which not only support but also thwart the functioning of law. Discipline and governmentality decenter the legal form of power. As concerns disciplinary power, Foucault argues that it is supplementary to law in that the former is a perfection of the latter. In Foucault's view, 'the panopticon is the oldest dream of the oldest sovereign: None of my subjects can escape and none of their actions is unknown to me. The central point of the panopticon still functions, as it were, as a perfect sovereign'.¹⁷⁶ Furthermore, when discussing the relation between governmentality and 'the juridical principle of sovereignty', Foucault argues that an analysis of the governmental form of power does not eliminate the problem of sovereignty but makes it 'more acute than ever'.¹⁷⁷ In fact, in his discussion of the operation of normalization particular to the different forms of power, Foucault notes that he is interested in discipline and governmentality because they reveal 'how techniques of normalization develop from and below a system of law, in its margins and maybe even against it'.¹⁷⁸

1.5.4 Population

Foucault relates governmentality as a distinct form of power to the emergence of the population as the 'new subject-object'¹⁷⁹ of political power. In Foucault's interpretation, the population has mainly two manifestations. On the one hand, the population refers to the biological existence of a collection of individuals as human species. On the other hand, the notion of population can be defined in the sense of a public, that is, 'the population seen under the aspect of its opinions, ways of doing things, forms of behavior, customs, fears, prejudices, and requirements; it is what one gets a hold on through education, campaigns, and convictions'.¹⁸⁰ According to Foucault, the population is an object of power in that it is 'that on which and towards which mechanisms are directed in order to have a particular effect on it'. That is, the population is 'framed by a regulatory apparatus' as the object of power.¹⁸¹ The population can also be conceived as the subject of power in the sense that 'it is called upon to conduct itself in such and such a fashion';¹⁸² the population as a subject in the sense of individuals that are turned into 'an element of the thing we want to manage in the best way possible' so that they 'conduct themselves properly'.¹⁸³ In other words, governmentality causes individuals to subject themselves as a member of the population. Consequently, the primary object of governmentality is the population, that is, the multiplicity of individuals constituted as a *whole*, and not the multiplicity of individuals as such.¹⁸⁴ Indeed, governmentality establishes the individuals as 'the instrument, relay, or condition for obtaining something at the level of the population'.¹⁸⁵ To the extent that Foucault understands the population as a whole of individuals it seems to be reductive to approach it only from the perspective of the individual, as Foucault

¹⁷⁶ Foucault, *Security, Territory, Population*, 2007, p. 66.

¹⁷⁷ Foucault, *Security, Territory, Population*, 2007, p. 107.

¹⁷⁸ Foucault, *Security, Territory, Population*, 2007, p. 56.

¹⁷⁹ Foucault, *Security, Territory, Population*, 2007, p. 77.

¹⁸⁰ Foucault, *Security, Territory, Population*, 2007, p. 75.

¹⁸¹ Foucault, *Security, Territory, Population*, 2007, p. 69.

¹⁸² Foucault, *Security, Territory, Population*, 2007, pp. 42-43.

¹⁸³ Foucault, *Security, Territory, Population*, 2007, p. 43.

¹⁸⁴ Foucault, *Security, Territory, Population*, 2007, p. 42.

¹⁸⁵ Foucault, *Security, Territory, Population*, 2007, p. 42.

does, and not also from the perspective of the population as a unity. The latter would imply interpreting the population as a collective subject, i.e. a collective as an acting unity. Indeed, what seems to be assumed by Foucault's understanding of the population as a collective is the idea of collective self-relation, something that is irreducible to individual self-relation.

The definition of a population as a subject raises the question about the distinction between governmentality and law. What is the relation between the notions of a population and a people 'constituted and created by the social contract'?¹⁸⁶ Foucault defines the population as a subject in a different sense than the legal notion of a people: 'the population as a political subject, as a new collective subject absolutely foreign to the juridical and political thought of earlier centuries . . .'.¹⁸⁷ In Foucault's interpretation, the notions of a population and a people both indicate a 'process of subjectivation'¹⁸⁸, albeit in a different sense. Whereas in the case of governmentality subjectivation expresses the idea that an individual subjects itself as a member of a population and hence concerns an individual self-relation, the subjectivation of a people concerns a collective self-relation, i.e. 'collective subjectivation'.¹⁸⁹ Central to collective subjectivation in the case of the legal form of power is the external relation of obedience between the sovereign and the individual subjects constituted as a collective.¹⁹⁰ In the case of governmental power, the collective subjectivation triggers a process of individual self-subjection.

Ultimately, at the root of Foucault's shift from the legal notion of a people to the governmental notion of the population lies the idea that a collective subject is a 'chimera'.¹⁹¹ In Foucault's view, the notion of a collective subject is nothing more and nothing less than a construction created to enable the exercise of power. This means that Foucault defines collective subjectivity from what Deleuze would call a 'third person' perspective, and not from a first-person perspective; Foucault accounts for collective subjectivity in terms of an object. By defining collective subjectivity in terms of a process of individual subjectivation, Foucault seems to ignore the more fundamental meaning of collective subjectivity implied by the notion of a people, namely the collective as an acting unity. In fact, key to the legal notion of a people is the self-relation of a collective, the fact that a multitude relates to itself as a whole, a self-relation that is irreducible to an individual self-relation. I will return to this point in the next chapters.

1.5.5 Territory

Let us now turn to another concept that is central to Foucault's course at the *Collège de France* on governmentality: territory.¹⁹² This is an important notion as it illustrates the difficulties of

¹⁸⁶ Foucault, *Security, Territory, Population*, 2007, p. 44.

¹⁸⁷ Foucault, *Security, Territory, Population*, 2007, p. 42.

¹⁸⁸ See Deleuze, *Foucault*, 2006, pp. 78-101.

¹⁸⁹ Deleuze, *Foucault*, 2006, p. 86.

¹⁹⁰ Foucault, *Security, Territory, Population*, 2007, p. 44, 65.

¹⁹¹ Foucault, *Security, Territory, Population*, 2007, p. 43.

¹⁹² For an brief overview of Foucault's understanding of space, see Jeremy W. Crampton, 'Space, Territory, Geography', in Christopher Falzon, Timothy O'Leary & Jana Sawicki (eds.), *A Companion to Foucault*, Blackwell Publishing: Oxford, 2013, pp. 384-399.

Foucault's discourse analysis to come to terms with the problem of spatial unity and boundaries, which is related to his reductive account of collective subjectivity. According to Foucault, the notion of a territory is essential to 'the political effectiveness of sovereignty'.¹⁹³ A territory is the fundamental element 'of the juridical sovereignty of the sovereign as defined by philosophers or legal theorists'; it is 'the very foundation of the principality or of sovereignty'.¹⁹⁴ In this sense, the notion of a territory relates for Foucault to a legal form of power. The spatial nature of the legal form of power implies that it functions by means of delimitation, more specifically, delimitation in the sense of 'exclusion'.¹⁹⁵ In Foucault's view, disciplinary power also has a spatial nature. However, discipline is not so much concerned with delimitation as with the 'construction' or 'structuring' of space on the basis of a geometrical figure.¹⁹⁶ The organization of space enables the most effective exercise of power. Discipline is about the 'treatment of multiplicities in space, that is to say, the constitution of an empty, closed space within which artificial multiplicities are to be constructed and organized'.¹⁹⁷

The relation between power and space outlined by Foucault in the context of governmentality is quite different from law and discipline. Foucault develops the relation between power and space in the case of governmentality again in contradistinction to the legal form of power. If the exercise of legal power is related to a territory, the security mechanisms specific to governmentality relate what Foucault calls a 'milieu'. A milieu is 'the medium of an action and the element in which it circulates'¹⁹⁸ and therefore represents 'a multivalent and transformable framework'.¹⁹⁹ It is 'a set of natural givens – rivers, marshes, hills – and a set of artificial givens – an agglomeration of individuals, of houses, etcetera'.²⁰⁰ Elsewhere Foucault also uses the notion of 'a complex of men and things'²⁰¹ of which, he adds, territory and property are only 'variables'.²⁰² With the redefinition of territory into a milieu Foucault aims to capture a transition concerning the exercise of power. The transition from law and discipline to governmentality relates to the spatial structure of power, i.e. 'the structuring function of space and territory'.²⁰³ Space should be considered not only in the sense of the material basis for exercise of power, but as structuring power itself. By rejecting the notion of a territory Foucault somehow must provide an alternative, which he finds in the notion of the milieu. The question remains of course whether Foucault does not simply define the milieu as the inverse of a territory, that is, as boundless extension that has an osmotic relation to 'the outside'.²⁰⁴ Notice that both the notion of a territory and a milieu are definitions of space from a third-person perspective. Indeed, what is problematic about Foucault's understanding of space

¹⁹³ Foucault, *Security, Territory, Population*, 2007, p. 14.

¹⁹⁴ Foucault, *Security, Territory, Population*, 2007, p. 96.

¹⁹⁵ Foucault, *Security, Territory, Population*, 2007, pp. 9-10.

¹⁹⁶ Foucault, *Security, Territory, Population*, 2007, p. 17.

¹⁹⁷ Foucault, *Security, Territory, Population*, 2007, p. 17.

¹⁹⁸ Foucault, *Security, Territory, Population*, 2007, p. 21.

¹⁹⁹ Foucault, *Security, Territory, Population*, 2007, p. 20.

²⁰⁰ Foucault, *Security, Territory, Population*, 2007, p. 21.

²⁰¹ Foucault, *Security, Territory, Population*, 2007, p. 96.

²⁰² Foucault, *Security, Territory, Population*, 2007, p. 97.

²⁰³ Foucault, *Security, Territory, Population*, 2007, p. 29.

²⁰⁴ Foucault, *Security, Territory, Population*, 2007, p. 18.

is that it does not provide an account of the unity of space, i.e. the notions of territory and milieu as a spatial unity, and hence of boundaries as the distinction between inside and outside. As a result, it becomes difficult, if not impossible, to understand why and how maintaining this distinction could raise an issue for collective security. In effect, this distinction presupposes an *actor* perspective, the first-person plural perspective of a collective the members of which refer to a space as their own. In order to elaborate the notion of spatial unity we require a definition of space from a first-person perspective, that is, the understanding of space as a place.

1.5.6 Security

Distinctive of governmentality as a form of power are its techniques: security mechanisms. But how does Foucault define security in his discussion of governmentality? As we will see, Foucault interprets security as an instrumental notion. In order to cast some light on the techniques of power proper to governmentality, it is insightful to start from the distinction between legal power or sovereignty and bio-power as developed in *The History of Sexuality*. According to Foucault, whereas the legal form of power is essentially a 'formidable power over death',²⁰⁵ bio-power exerts 'a positive influence on life, that endeavors to administer, optimize, and multiply it, subjecting it to precise controls and comprehensive regulations'. The techniques particular to bio-power are regulatory control mechanisms, meaning that security is about controlling life.²⁰⁶ Key to the shift from the legal function of power to bio-power is the idea that life, and not death, becomes the object of power.

In the course 'Security, Territory, Population' Foucault further develops the notion of security intrinsic to governmentality in the context of his analysis of the reflective practice of governmental reason, *raison d'État*, a form of governmental reason that has the state as its historical locus.²⁰⁷ Foucault argues that to the extent that the governmental rationality of a state is self-referential,²⁰⁸ it is essentially 'conservative' or 'protective'.²⁰⁹ Accordingly, security has first of all the meaning of preserving 'the integrity of the state',²¹⁰ 'preserving the state in good order'²¹¹ and maintaining 'public order'.²¹² That is, security includes the meaning of 'the word "manutention", preserving, maintaining'.²¹³ But this is not all. In fact, as Foucault notes, 'the theory of the preservation of the state is completely insufficient to cover the real practice of politics and the implementation of *raison d'État*'.²¹⁴ Besides preservation, security implies

²⁰⁵ Foucault, *The History of Sexuality*, 1978, p. 137.

²⁰⁶ Foucault, *The History of Sexuality*, 1978, p. 139. Deleuze has developed Foucault's point, coining the notion of 'control society'. See Gilles Deleuze, 'Postscript on the Societies of Control', *October*, vol. 59, 1992, pp. 3-7.

²⁰⁷ It is important to note in this respect that to the extent that Foucault is interested in studying the rationality of governing, the state indicates only a certain 'practice' of governmental reason (Foucault, *Security, Territory, Population*, 2007, p. 277). This means that, in Foucault's interpretation, 'the state is an episode in governmentality' rather than that governmentality is 'an instrument of the state' (Foucault, *Security, Territory, Population*, 2007, p. 248).

²⁰⁸ See Foucault, *Security, Territory, Population*, 2007, pp. 257-258.

²⁰⁹ Foucault, *Security, Territory, Population*, 2007, p. 258.

²¹⁰ Foucault, *Security, Territory, Population*, 2007, p. 287.

²¹¹ Foucault, *Security, Territory, Population*, 2007, p. 313.

²¹² Foucault, *Security, Territory, Population*, 2007, p. 324.

²¹³ Foucault, *Security, Territory, Population*, 2007, p. 288.

²¹⁴ Foucault, *Security, Territory, Population*, 2007, p. 289.

the expansion of state power. In order to preserve the state, governmental reason is aimed at increasing the state's forces.²¹⁵ In this sense, Foucault claims that security is primarily about a state 'asserting' itself in a play of forces.²¹⁶ So, rather than conceptualizing security in terms of preservation, Foucault argues that it should be defined as 'self-assertion'.²¹⁷ At a later stage, I will return to examine the distinction between the definition of security as self-preservation and as self-assertion as assumed by Foucault, and reconsider his instrumental and reductive interpretation of security as self-assertion.

Foucault illustrates the distinction between self-preservation and self-assertion on the basis of two security techniques, to wit the 'military-diplomatic apparatus' and the 'apparatus of police'.²¹⁸ Whereas the military-diplomatic apparatus concerns security techniques at the inter-state level, the apparatus of police relates to them at the state level. According to Foucault, at the inter-state level the definition of security as self-assertion suggests that states are not simply rivals seeking to preserve themselves but rather competitors: 'states are situated alongside other states in a space of competition'.²¹⁹ This implies that the 'military-diplomatic apparatus' is focused on maintaining a balance at the inter-state level. That is, a state seeks the maintenance of a power balance with other states while at the same time pursuing its own growth. In this sense, strong competition at the inter-state level is in the state's own interest. As Foucault argues, at the inter-state level the objective is 'to ensure the security in which each state can effectively increase its forces without bringing about the ruin of other states or itself'.²²⁰

The security technique at the state level is, as mentioned, police.²²¹ Historically speaking, Foucault notes, police has a much broader definition than the way in which we understand it today. Whereas today we conceive police generally in the narrow sense of law enforcement, that is, the maintenance of public order, it used to refer to 'the set of means by which the state's forces can be increased while preserving the state in good order'.²²² So, police is also about the expansion of state power. To the extent that police is about governing 'men's co-existence with each other', this does not so much concern 'the immediate problem of surviving and not dying' but rather 'the problem of living and doing a bit better than just living'.²²³ As a consequence, police covers 'an immense domain'²²⁴ that potentially includes individual felicity: 'the objective of police is everything from being to well-being, everything that may produce this well-being beyond being, and in such a way that the well-being of individuals is the state's strength'.²²⁵ Therefore, police covers a wide range of problems including, what Foucault calls,

²¹⁵ Foucault, *Security, Territory, Population*, 2007, p. 292.

²¹⁶ Foucault, *Security, Territory, Population*, 2007, p. 291.

²¹⁷ Foucault, *Security, Territory, Population*, 2007, p. 291.

²¹⁸ Foucault, *Security, Territory, Population*, 2007, p. 296.

²¹⁹ Foucault, *Security, Territory, Population*, 2007, p. 289.

²²⁰ Foucault, *Security, Territory, Population*, 2007, p. 300.

²²¹ This theme has been picked up in Markus D. Dubber & Mariana Valverde (eds.), *The New Police Science. The Police Power in Domestic and International Governance*, Stanford University Press: Stanford, 2006. See also Mireille Hildebrandt's review of this book, 'Governance, governmentality, police and justice', *Buffalo Law Review*, vol. 56, 2008, pp. 101-142.

²²² Foucault, *Security, Territory, Population*, 2007, p. 313.

²²³ Foucault, *Security, Territory, Population*, 2007, p. 326.

²²⁴ Foucault, *Security, Territory, Population*, 2007, p. 327.

²²⁵ Foucault, *Security, Territory, Population*, 2007, p. 328.

‘the necessities of life’, such as the circulation of food, the problem of health and ‘anything that may support disease in general’, ‘the regulation of professions’, and ‘the number of men’.²²⁶ The latter issue, the number of men, is of special interest as it relates to the problem of immigration. In fact, it is in the context of his analysis of police that Foucault makes one of his sparse remarks related to immigration.

According to Foucault, most of the time the regulation of the number of men is discussed on the basis of what Foucault calls an ‘essentialist definition of *raison d’État*’, meaning that ‘the state really conforms to what it is’.²²⁷ This relates to the definition of security as self-preservation, and not as self-assertion. However, in so far that security concerns the expansion of state power, there is no essence on the basis of which the regulation of the number of men can be established. Therefore, the real security question is ‘how many men are really needed and what the relationship should be between the number of men and the size of the territory, and its wealth, for the best and most certain development of the state’s strength’.²²⁸ As Foucault emphasizes, this means that ‘it is not the absolute number of the population that counts, but its relationship with the set of forces: the size of the territory, natural resources, wealth, commercial activities, and so on’.²²⁹ In other words, police does not regulate the number of men on the basis of ‘what men are’ but rather on the basis of ‘what men do’,²³⁰ i.e. what they can contribute to the strengthening of the state’s forces or what Foucault terms ‘the creation of a public utility’.²³¹ For this reason police is the ‘regulatory apparatus’ that, for example, ‘prevents emigration’ and ‘calls for immigrants’.²³²

Let me round up this section on Foucault’s concept of governmentality by summarizing its main findings. First of all, I have discussed in some detail the specific methodology adopted by Foucault: discourse analysis. Foucault aims to demonstrate the constructivist nature of ‘things’ by analyzing them as a discursive formation. According to Foucault, we deceive ourselves if we take a discursive formation to exist in the reified sense of an object. Applying his methodology to governmental practices, Foucault defines the population as the object of power, as the ‘security referent’, to put it in the language of security scholars. The population as a subject-object is the dependent effect of governmentality. Importantly, the multiplicity of individuals as whole, as a population, is not only the object of power but is also constitutive of an individual’s self-relation. The construction of a population, so to speak, enables the production of an individual self-relation. Accordingly, Foucault’s theory of governmentality makes it difficult to connect the notion of collective security to that of collective subjectivity as assumed by the legal form of power that turns on the relation that a range or actors take up with respect to themselves as a group or unity. The understanding of collective subjectivity from a third-person perspective is confirmed by Foucault’s analysis of the governmental spa-

²²⁶ Foucault, *Security, Territory, Population*, 2007, pp. 323-324.

²²⁷ Foucault, *Security, Territory, Population*, 2007, pp. 287-288.

²²⁸ Foucault, *Security, Territory, Population*, 2007, p. 323.

²²⁹ Foucault, *Security, Territory, Population*, 2007, p. 323.

²³⁰ Foucault, *Security, Territory, Population*, 2007, p. 322.

²³¹ Foucault, *Security, Territory, Population*, 2007, p. 323.

²³² Foucault, *Security, Territory, Population*, 2007, p. 69.

tiality of security. Last but not least, Foucault's analysis of governmentality includes a fundamental definition of security. According to Foucault, security does not only mean self-preservation but also self-assertion, which he interprets in the instrumental sense as the expansion of power. The 'self' that is engaged in self-assertion is the effect of techniques of government. This move makes it well-nigh impossible to explain security and insecurity as a mode of being of a collective subject. This, I submit, is the move that joins Foucault to the Foucaultian approach to security studies.

Conclusion

In order to diagnose the cause of the crisis of security studies, in this chapter I have analyzed its conceptual framework. Security scholars tend to be biased towards a military or exceptional understanding of security. In my view, the root of the crisis of security studies concerns the conceptualization of the referent of security. The traditional approach defines the security referent in an objectivistic way as a referent object. Building on insights from the widening debate, the securitization theory and critical security studies, the Foucaultian approach effectuates a deconstruction of the threat-referent object matrix, arguing that the security referent is a construct. Notwithstanding their disagreement as concerns the subject matter of their own discipline, it seems that security scholars share the basic understanding of security in terms of the problem of existence/non-existence.

In order to deepen my analysis of the Foucaultian approach I have reflected on Foucault's theory of governmentality. Rather than engaging in an analysis of the degree in which the Foucaultian approach remains faithful to Foucault, I have attempted to tease out some elements of what we could call the philosophical foundation of the Foucaultian approach. Foucault's methodology results in a thesis about the ontological status of the 'referent' of governmental practices. In Foucault's interpretation, a collective can be said to exist only as the dependent effect of governmental practices. Ontologically, the mode of being of a collective as the object of governmental practices is a purely discursive actuality. Outside of discourse the referent of power only has phantom existence as faceless potentiality. Now, this understanding of the ontological status of the referent of governmental power is reflected in Foucault's definition of collective subjectivity. Foucault interprets collective subjectivity reductively in the sense of an object, that is, from what Deleuze calls a third-person perspective. To the extent that the referent is but the dependent effect of security techniques reducing it to a discursive formation, Foucault's analysis of governmentality approaches the notion of collective subjectivity only from the third-person perspective, thereby effacing the notion of collective subjectivity in a first-person perspective. As a result, security and insecurity become purely discursive effects, ceasing to be categories which could explain the mode of being of a collective: existence. This conclusion is taken over by security scholars who adopt a Foucaultian framework.

In sum, its critical analysis of the traditional theoretical framework notwithstanding, it appears that the Foucaultian approach cannot resolve the crisis of security studies. The implication of my analysis of the conceptual framework of security studies is quite fundamental.

Security scholars seem to lack the conceptual resources to account for the security referent as the subject of security, as R.B.J. Walker puts it. And without the notion of a collective subject of which can be predicated that it is secure or insecure, what remains is an instrumental understanding of security that is unable to account for the value of security.

Chapter 2

Security as Collective Self-Preservation

2.1 Introduction

The conception of collective security as a technique of government elaborated in Chapter 1 represents what we could call a constructivist conception. In this Chapter I will explore an alternative, existential concept of security, namely, the concept of security that can be abstracted from Schmitt's political and legal philosophy. Whereas the Foucaultian approach of security studies provides an utterly critical account of collective security, Schmitt provides insight into its positive value. If Schmitt was one of the main targets of the Foucaultian approach, my aim in this Chapter is to turn the tables, considering, albeit critically, Schmitt's contribution to an existential concept of security. In Schmitt's view, the focus of the concept of security must be a collective that can be secure or insecure, i.e. a *subject* of security. A collective is, in Schmitt's view, not merely a normative unity but first and foremost an *existential unity*. In other words, Schmitt's political and legal philosophy is interesting and important because it entails a concept of security that, although extremely problematic in a number of ways, does take seriously the notion of *collective subjectivity*, a notion, I want to argue, which is crucial in making conceptual and normative sense of the term.

In this chapter I will argue that Schmitt defines security as collective self-preservation. Schmitt argues that the notion of public order is the legal determination of what he defines ontologically as collective self-preservation. In Schmitt's interpretation, what is at stake in the legal notion of public order is the existential unity of a collective subject. In this sense, the argument of this Chapter substantiates Schmitt's 'conviction' that fundamental legal problems can only be elucidated on the basis of philosophical concepts.²³³ Schmitt's existential definition of security is polemically oriented towards what he calls 'normativism', a branch of legal philosophy that reduces collective (in)security to (il)legality. However, as Schmitt argues, public order is precisely that situation in which the distinction between legality and illegality is challenged and the legal order does not provide a ready-made answer. In order to make the passage from a normative to an existential concept of security, I will establish step by step the

²³³ Jean-François Kervégan, *Hegel, Carl Schmitt: le politique entre speculation et positivité*. Presses Universitaires de France: Paris, 1992, p. 142.

link between public order and collective self-preservation, hence between the legal and the ontological determinations of collective security.

To be sure, I readily concede that the concept of security as such does not receive explicit attention in Schmitt's political and legal philosophy, and thus will require some interpretative work. It is for this reason that my interpretation of Schmitt's political and legal philosophy stands at some distance from more conventional readings of his work. In fact, since my interpretation focuses on the concept of security, my reading of the corpus of Schmitt's writings is rather selective. I do not aim to develop an exegetical study that is faithful to Schmitt's own intentions, if such a thing is possible at all. Instead, I am interested in making Schmitt's political and legal philosophy useful for thinking through the concept of security, even though I will be highly critical of a number of his premises, as it can account for something that normativism could at best postulate without explaining, namely, a collective subject that can be secure or insecure.

The argument of this Chapter unfolds in four steps. In the second section I trace the polemic between the normative and the existential concept of security back to Max Weber's definition of statehood and discuss Schmitt's critique of the normativist concept of security. The third section forms a prelude to Schmitt's existential concept of security, analyzing Schmitt's account of the notion of public order as it features in his discussion of Article 48 of the Weimar Constitution. In the fourth section I will turn to the problem of existential unity, introducing and reconstructing Schmitt's concept of concrete order as an institution, as normal order, as homogeneity and as a *nomos*. The preceding sections find their culmination in section five, in which I will develop Schmitt's definition of security as collective self-preservation.

2.2 From a Normativist to an Existential Concept of Security

Schmitt's existential concept of security that we will unearth and explore in the course of this Chapter has its origins in his discussion with Hans Kelsen's concept of state. Indeed, I will be concerned to show that there is an internal connection between the way in which Schmitt approaches the concepts of state and security, and that this internal connection is polemically oriented against what he takes to be the untoward reduction of the concept of state defended by normativism, notably the brand of normativism espoused by his most important intellectual opponent, Hans Kelsen. What is perhaps less well-known is that the debate between Schmitt and Kelsen has its roots in the ambiguous characterization of the state offered by Max Weber, the great German sociologist. Accordingly, the aim of this section is to prepare the stage for a discussion of Schmitt's approach to the concept of security by briefly outlining Weber's concept of the state and its reception by Kelsen.

2.2.1 Weber's Concept of State

The root of the polemic between the normative and the existential concepts of security can be traced back to Max Weber's definition of statehood, as the latter allows for two possible interpretations. The first interpretation is the state as a normative unity. This is the line pursued by Kelsen. The second possibility is that of the state as a factual unity. This is the line followed

by Schmitt. I will briefly discuss the salient features of Weber's concept of state insofar as they help us to clarify the different approaches to the concept of security which are available to Kelsen and to Schmitt.

Max Weber's definition of statehood is ambiguous and stems from his methodological individualism.²³⁴ For Weber, the ontological substrate of sociological phenomena is individual human conduct. This means that sociological categories of coordinated acts (*Zusammenhandeln*) are considered to be reducible to individual conduct. From a sociological point of view, Weber argues, social collectivities (*soziale Gebilde*) are 'the resultants and modes of organizations of individual human beings', that is, 'a certain kind of development of actual or possible social actions of individuals'.²³⁵ Reflecting on the notion of the modern state, Weber notes that the state as a social collectivity is nonetheless perceived partly as something actually existing and partly as something normative. 'These concepts of collective entities which are found both in common sense and in juristic and other technical forms of thought, have a meaning in the minds of individual persons, partly as of something actually existing (*Seiendem*), partly as something with normative authority (*Geltensollendem*)'.²³⁶ Indeed, as Weber notes, although individual human acts are oriented towards the state and thus pertain to something normative, the state also has factual implications for the course of actions of real individuals. Therefore, Weber argues that the modern state exists as a complex of coordinated acts, inasmuch as the actions of certain human individuals are oriented to the idea that it exists or ought to exist.²³⁷

As is well-known, Weber claims that the modern state deploys a specific organization of political domination. In Weber's view, legal order is the characteristic form of the domination structure (*Herrschaftsverband*) in the modern state. Weber defines legal order as an abstract, objective system of rules. The legitimacy of this type of domination is based on the principle of legality. The legal order is deemed legitimate as a coercive apparatus (*Zwangsinstitut*) if it functions as a formal, systematic whole.²³⁸ This means that the modern state derives its normative authority from its legality.

2.2.2 The State as a Legal Unity

Interestingly, Kelsen provides what is perhaps the most radical interpretation of Weber's characterization of the state as a normative concept. It is this interpretation of state as a normative unity against which Schmitt's existential concepts of state and security are polemically oriented. According to Schmitt, by defining the state as a legal order, and a legal order as a unity or system of norms, Kelsen ends up conceptualizing security in strictly normativist fashion,

²³⁴ For a reconstruction of Weber's concept of state, see Karl Dusza, 'Max Weber's Conception of the State', *International Journal of Politics, Culture, and Society*, vol. 3, no. 1, 1989, pp. 71-105.

²³⁵ Max Weber, *Economy and Society. An Outline of Interpretative Sociology*, trans. Ephraim Fischhoff et al., University of California Press: Berkeley, 1978 [1922], p. 13.

²³⁶ Weber, *Economy and Society*, 1978, p. 14.

²³⁷ 'Thus, for instance, one of the important things of the existence of a modern state, precisely as a complex of social interaction of individual persons, consists in the fact that the action of various individuals is oriented to the belief that it exists or should exist, thus that its acts and laws are valid in the legal sense' (Weber, *Economy and Society*, 1978, p. 14)

²³⁸ Weber, *Economy and Society*, 1978, p. 311 ff.

namely, on the basis of the distinction between legality and illegality. In fact, normativism does so in a way that empties (il)legality of its existential dimension, as Kelsen rejects the notion of collective subjectivity, which is the necessary presupposition of an existential concept of collective security. Such, at any rate, is Schmitt's claim. It should be noted, at the outset, that my aim in this and the following sub-section is not so much to present Kelsen's theory of law in its strongest possible light but rather to single out those aspects of it with which Schmitt took strong issue, and which serve as a foil or contrast for Schmitt's concept of security.

Although Kelsen agrees with Weber's reduction of social collectives to individual human conduct, he also questions Weber's analysis of the modern state. According to Kelsen, Weber's suggestion that the state exists both as a sociological-factual and as a legal-normative entity is 'logically impossible'.²³⁹ If Weber defines the state as a complex of coordinated acts, Kelsen argues that he first needs to provide a criterion on the basis of which the state can be perceived as a unity. What defines the unity of a multitude of human acts? In Kelsen's view, Weber cannot but resolve the problem of the unity of the state by shifting his analysis from the factual to a normative realm. A social collective is constituted as a unity through law. This means that the unity of the social collective is fundamentally a normative unity; the unity of a social collective can only exist as a legal unity. As Kelsen notes in his analysis of democracy, 'the "people" is by no means – as is naively believed – an embodiment, a conglomerate, as it were, of human beings, but merely a system of the acts of single human beings determined by the state's legal order'.²⁴⁰

By defining the unity of the state as a legal unity, Kelsen effectively claims that a unified social collective only appears as such in a passive sense, namely, as the object of rule. Formulating it in a Weberian fashion, Kelsen contends that 'if the unity of the people is only a unity of human actions regulated by the state's legal order, then in this normative sphere, in which "domination" means normative obligation, subordination to norms, the people as a unity is again only the object of rule'.²⁴¹ Since the legal order only regulates a defined set of human behavior, the social collective appears primarily in a passive way as subject to the law. This is not to say, however, that Kelsen dismisses the role of individuals as active, ruling subjects altogether. In a democracy, Kelsen argues, individuals are recognized as ruling subjects to the extent that they participate in creating the legal order, that is, to the extent that they are involved in the process of norm creation. Nevertheless, individuals can participate in norm creation only if they are recognized as addressees of the legal order. So, in Kelsen's view, only the individual can act as a subject of rule, and not the social collective. Pointing to a pitfall of democratic political ideology, Kelsen notes that 'not all those belonging to the people as subject to norms or rule can take part in the process of norm creation - the form in which rules is necessarily exercised - or can form the people as ruling subject'.²⁴²

²³⁹ Hans Kelsen, *General Theory of State and Law*, trans. Anders Wedberg, Harvard University Press: Cambridge, 1949, p. 189.

²⁴⁰ Hans Kelsen, *Vom Wesen und Wert der Demokratie*, Sientia Verlag: Aalen, 1981 [1920], p. 15, my translation, MB.

²⁴¹ Kelsen, *Vom Wesen und Wert*, 1981, p. 16, my translation, MB.

²⁴² Kelsen, *Vom Wesen und Wert*, 1981, p. 17, my translation, MB.

Kelsen's considerations on the concept of democracy are important because they illuminate how he deals with the problem of collective subjectivity, which, in his terms, amounts to a 'supra-individual social organism made up of individual human beings'.²⁴³ Kelsen dismisses the notion of collective subjectivity out of hand as an extra-systemic hypostatization, relying to this effect on Max Weber's methodological individualism. As Kelsen contends, 'the state's every expression of existence, its every act, can only appear as a legal act, as an act creating or applying legal norms'.²⁴⁴ For Kelsen the notions of state and legal order are identical, and not distinct from one another as assumed by Schmitt. 'A closer look shows it [the state, MB] to be a coercive social system, which must be identical with the legal system since the very same coercive acts distinguish both systems, and since one and the same social community cannot be constituted by two different systems. The state, then, is a legal system'.²⁴⁵ This is to say that, in Kelsen's interpretation, the problem of the state as collective legal subject should be analyzed as a problem of imputation: the imputation of acts to a legal system.

Behavior imputed to the state is, strictly speaking, the behavior of an individual human being. State behavior refers to a human being who is qualified as an 'organ' of the state.²⁴⁶ It is only on the condition that the individual human being is empowered as a state organ that her acts can be imputed to the state. 'By virtue of such empowerment, these coercive acts can be linked by imputation to the community, and thus it is the community that is responding to the unlawful acts with coercive acts . . . because they are linked by imputation to the community'.²⁴⁷ Consequently, being identical to legal order, the notion of state is reduced to a normative unity, in particular a legal unity: a state is a legal order.

2.2.3 The State Order as Legal Order

Following Weber's analysis of the modern state and its particular domination structure, Kelsen defines legal order as a system of norms. Kelsen seeks to understand the validity of positive law as it stands in purely legal terms, that is, as a valid coercive system that orders human behavior. The defining elements of law as a coercive social system are norms. As Kelsen sees it, norms have a 'specific existence'²⁴⁸ that stands in contradistinction to material facts of human behavior. Importantly, in Kelsen's interpretation, this split between norm and material fact, between normativity (*Sollen*) and factuality (*Sein*), secures the specific autonomy of the normativity of positive law. By conferring legal meaning to human behavior, norms function as 'schemes of interpretation'²⁴⁹ of material facts of human behavior. As schemes for the interpretation of human behavior, norms establishes which behavior ought to take place.

Starting from the normativity proper to positive law, Kelsen argues that the ought character of positive law appears in the link between legal condition (the material facts of

²⁴³ Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. Bonnie L. Paulson & Stanley L. Paulson, Clarendon Press: Oxford, 1992 [1934], p. 49.

²⁴⁴ Kelsen, *Introduction*, 1992, p. 100.

²⁴⁵ Kelsen, *Introduction*, 1992, p. 99.

²⁴⁶ Kelsen, *Introduction*, 1992, p. 101.

²⁴⁷ Kelsen, *Introduction*, 1992, p. 99.

²⁴⁸ Kelsen, *Introduction*, 1992, p. 12.

²⁴⁹ Kelsen, *Introduction*, 1992, p. 10.

human behavior) and legal consequence (a sanction). A legal norm, Kelsen notes, is ‘a hypothetical judgment that expresses the specific linking of a conditioning material fact with a conditioned consequence’²⁵⁰, that is, the linking of a condition (human behavior) with a consequence (a sanction). Human behavior that qualifies as a condition for a sanction represents a case of illegality. Human behavior that doesn’t qualify as such is a manifestation of legality. Kelsen introduces the notion of imputation to define the normative relation between condition and consequence. This is a second form of imputation, ‘peripheral’ imputation, which Kelsen distinguishes from the form of ‘central’ imputation mentioned earlier.²⁵¹ If a causal relation establishes that a certain condition ‘must’ have certain consequence as its effect, a normative relation establishes that a certain condition ‘ought’ to be sanctioned by a certain consequence.²⁵² This suggests that a legal norm is essentially a ‘reconstructed legal norm’.²⁵³

Having defined positive law in terms of legal norms, the crucial question for Kelsen concerns the validity of these norms. This problem boils down to the unity of a plurality of legal norms. What defines a manifold of legal norms as a *unity*? Put differently, what defines positive law as an *order*? According to Kelsen, ‘a norm is valid *qua* legal norm only because it was arrived at in a certain way – created according to a certain rule, issued or set according to a specific method’.²⁵⁴ This account of the validity of legal norms suggests that legal norms are not valid on the basis of their substance, i.e. their content. Rather, central to Kelsen’s definition of validity of legal norms is their formal character. The law, Kelsen contends, can have any social reality as its content. Instead a legal norm is valid because its creation can be traced back to another legal norm. A legal norm ‘is valid because and in so far as it was created in certain way, that is, in the way determined by another norm; and this latter norm, then, represents the basis of the validity of the former norm’.²⁵⁵

In order to cut off the infinite regress of what Joseph Raz dubs the ‘chain of validity’,²⁵⁶ Kelsen claims that the law is a hierarchical order of legal norms grounded on the basic norm. The basic norm forms the ultimate basis of validity in that it is ‘the basic rule according to which the norms of the legal system are created’.²⁵⁷ Kelsen argues that the basic norm is the ‘hypothetical foundation’ of the validity of legal norms: ‘given the presupposition that the basic norm is valid, the legal system resting upon it is valid’.²⁵⁸ This means that a positivistic understanding of law presupposes the ought character of legal norms; the validity of the basic norm needs to be presupposed if the legal system is to be a *positive* legal system. As a consequence, the validity of positive laws is founded on what Raz calls a ‘non-positive law’. For ‘only a non-

²⁵⁰ Kelsen, *Introduction*, 1992, p. 23.

²⁵¹ So, whereas peripheral imputation applies to the normative relation between legal condition and legal consequence, central imputation means linking behavior to a legal order. On this distinction, see Kelsen, *Introduction*, 1992, pp. 50-51.

²⁵² Kelsen, *Introduction*, 1992, p. 24.

²⁵³ Kelsen, *Introduction*, 1992, p. 23.

²⁵⁴ Kelsen, *Introduction*, 1992, p. 56.

²⁵⁵ Joseph Raz, ‘Kelsen’s Theory of The Basic Norm’, in: *The Authority of Law. Essays on Law and Morality*, Clarendon Press: Oxford, 1979, pp. 122-145, especially pp. 125-126.

²⁵⁶ Raz, ‘Kelsen’s Theory of The Basic Norm’, 1979, p. 125.

²⁵⁷ Kelsen, *Introduction*, 1992, p. 56.

²⁵⁸ Kelsen, *Introduction*, 1992, p. 58.

positive law can be the ultimate law of a legal system; only it does not presuppose another norm from which it derives its normativity'.²⁵⁹ Kelsen emphasizes the crucial function of the basic norm for a positivistic understanding of law. In his view, only by presupposing the basic norm can positive law be understood as a system that governs its own creation, that is, a hierarchically structured and self-creating normative *order*.

As a result, by taking for granted that there is a fundamental split between normativity and factuality, normativism reduces security and insecurity to legal constructs, or so Schmitt will argue. That is, human behavior can be considered as a cause of insecurity if it qualifies as a legal condition of a legal consequence, if it can be reconstructed as an illegal act. The empty or formal character of the normativist concept of security follows from the reduction of the state to a legal unity, and of legal order to a unity of norms. Consequently, it would seem that collective security and insecurity collapse into the aggregate security and insecurity of individuals under a legal order. For Kelsen's analysis precludes that there can be such a thing as a collective that can be secure or insecure; only individuals can be such.

2.2.4 Schmitt's Critique of the Normativist Interpretation of Security

Schmitt claims that this approach to security and insecurity is highly problematic. In his view, there is an internal connection between the normative notion of the state as a legal unity and the reductive understanding of (in)security as (il)legality. Schmitt's critique of Kelsen's normativist interpretation of security presupposes a radically different concept of state from Kelsen's normative one. Taking Weber's conception of state in the opposite direction, Schmitt interprets it as an existential unity. Therefore, before turning to Schmitt's critique of Kelsen's normativist concept of security, let me point out the stakes of Schmitt's transformation of the concept of state, in fact an issue to which I will return and discuss in detail in terms of the notion of concrete order.

If Kelsen attempts to purify Weber's conception of state by defining the state as a strictly normative concept, Schmitt pushes Weber's conception in the opposite direction, taking his cue from the factual or existential dimension of the state. In *Constitutional Theory* Schmitt takes a first step towards transforming the normative concept of state into an existential notion, which can be viewed as a preparatory step towards his concept of concrete order as developed in *On the Three Types of Juristic Thought*. Recognizing that Kelsen develops an absolute concept of state, insofar as he defines the state as a unified whole, Schmitt elaborates an existential redefinition of this absolute concept of state. Opposing Kelsen's 'ideal' (*gedachtes*) definition of state, Schmitt defines it as a 'real' (*wirkliches*) unity.²⁶⁰ According to Schmitt, if the concept of state is to be used as a meaningful concept, it should mean the political unity of a people, that is to say, the 'actually present' (*seinsmäßige vorhandener*) 'complete condition' (*Gesamtzustand*) of political unity and order.²⁶¹ As Schmitt sees it, the actual existence of political unity is the basic presupposition of a legal order. In this respect, he draws an analogy

²⁵⁹ Raz, 'Kelsen's Theory of the Basic Norm', 1979, p. 125.

²⁶⁰ Carl Schmitt, *Constitutional Theory*, trans. Jeffrey Seitzer, Duke University Press: Durham/London, 2008 [1928], p. 59.

²⁶¹ Schmitt, *Constitutional Theory*, 2008, pp. 59-60.

between the status of the individual in private law and that of the state in public law. 'A state . . . is as little able to advance a justification . . . as the individual living person must or could justify his existence normatively in the sphere of private law'.²⁶²

So, in Schmitt's view, the state is an existential rather than a normative unity. Actually, whereas Kelsen reduces the notion of state to legal order, Schmitt claims that the concept of legal order comprises two conceptually independent elements, namely the normative element of law and the existential element of order.²⁶³ As a consequence, rather than following Weber's observation that the legitimacy of the modern state lies in its legality, as Kelsen does, Schmitt attempts to disentangle the problem of legitimacy from the problem of legality. Hans Blumenberg provides a clear description of Schmitt's distinction between legitimacy and legality:

'Legitimacy for Schmitt is a diachronic-historical or horizontal relation of foundation, producing the inviolability of systems of order out of the depths of time, as it were, whereas legality is a synchronic structure, read vertically which supports a finding by its relation to a norm, a norm by its relation to a higher-level norm.'²⁶⁴

As Schmitt argues in *Constitutional Theory*, a legal order is not legitimate because it functions as a closed, rational system of norms, but rather because it is grounded on the will of a collective subject. 'In contrast to mere norms, the word "will" denotes an actually existing power as the origin of command (*ein seinsmäßige Größe als den Ursprung eines Sollens*). The will is existentially present; its power or authority lies in its being.'²⁶⁵ The legal order, Schmitt submits, presupposes 'a subject capable of acting'²⁶⁶, i.e. a collective subject. Accordingly, Schmitt's transformation of the concept of state implies a different solution to the ambiguity in Weber's definition of statehood between normativity and factuality than that of Kelsen. Instead of reinforcing the dualism between the realms of normativity and factuality, Schmitt leads the normative realm back to the realm of factuality and, more precisely, to the existential realm of the state.²⁶⁷

Schmitt's reconsideration of the distinction between factuality and normativity that follows from his existential definition of state provides the fuel for his critique of Kelsen's normivist interpretation of (in)security. Schmitt takes issue with what he calls the 'matter-of-factness' (*Sachlichkeit*) of normativism, that is, the normivist claim that (in)security can be reduced to legal concepts.²⁶⁸ According to Schmitt, collapsing security and insecurity into the

²⁶² Schmitt, *Constitutional Theory*, 2008, p. 138.

²⁶³ Carl Schmitt, *Political Theology. Four Chapters on the Concept of Sovereignty*, trans. George Schwab, MIT Press: Cambridge/London, 1985 [1922], p. 12; also Schmitt, *Constitutional Theory*, 2008, p. 65.

²⁶⁴ Hans Blumenberg, *The Legitimacy of the Modern Age*, trans. Robert M. Wallace, MIT Press: Cambridge/London, 1985, pp. 111-112.

²⁶⁵ Schmitt, *Constitutional Theory*, 2008, p. 64.

²⁶⁶ Schmitt, *Constitutional Theory*, 2008, p. 75.

²⁶⁷ Erich Voegelin, 'Die Verfassungslehre von Carl Schmitt. Versuch einer konstruktiven Analyse ihrer Staatstheoretischen Prinzipien', *Zeitschrift für Öffentliches Recht*, vol. 11, 1931, pp. 89-109, especially p. 93.

²⁶⁸ Carl Schmitt, *On the Three Types of Juristic Thought*, trans. Joseph W. Bendersky, Praeger: Westport/London, 2004 [1934], p. 53.

distinction between legality and illegality presupposes that ‘normativity and facticity are “completely different planes”’: the ‘ought’ (*Sollen*) lies outside of the ‘is’ (*Sein*) and . . . retains its own inviolable sphere . . .’²⁶⁹

Schmitt illustrates the impersonal, ‘juristic-normativist logic’ on the basis of the notion of *Tatbestand*, i.e. the factual character of behavior.²⁷⁰ For normativism, the factuality of behavior can either be said to be in line with the norm or in breach thereof. According to Schmitt, the problem with the normativist notion of *Tatbestand* is that the result remains the same in either of the two cases. In both lawful and the unlawful situations, the *Tatbestand* can be subsumed under a general norm, namely either in the sense of affirming or breaching the norm. As consequence, the infringement of a norm does not have a concrete meaning since the norm ‘continues to operate unchanged’ in case of an infringement.²⁷¹ The upshot of the normativist logic of the *Tatbestand* is that the concrete reality of the distinction between legality and illegality, order and disorder, security and insecurity, is only rendered as ‘the material basis for the application of norms’ and thus reduced to a normativist construct.²⁷² Therefore, Schmitt submits, from the normativist point of view ‘the criminal does not break the peace or order; he does not even break the general norm as rule; “juristically considered”, he actually breaks nothing at all’.²⁷³

Schmitt’s argument that the normativist argument that human behavior cannot actually breach a norm does not only hold for the individual norm. It also extends to the legal order as a whole, to its unity. This point follows from Kelsen’s account of the distinction between validity and efficacy. According to Kelsen, an individual legal norm that belongs to a positive legal order can be valid without being efficacious. For ‘the inefficacious norm remains valid because and in so far as it is part of the chain of creation of a valid legal system’.²⁷⁴ Individual norms remain valid, despite being inefficacious, to the extent that they relate back to the basic norm. And, as Kelsen argues, the basic norm of a positive legal system is necessarily both valid and efficacious. ‘The norms of a positive legal order are valid *because* the fundamental rule regulating their creation, that is, the basic norm, is presupposed to be valid, not because they are effective; but they are valid only *as long as* this legal order is effective’.²⁷⁵ Now, to the extent that the basic norm is a normative presupposition, it cannot be violated, Schmitt argues. Consequently, the violation of a legal norm seems to affect neither the validity of this individual norm nor the legal order as a unity. In this respect, the normativist conception of security, based on the distinction between legality and illegality, appears as rather abstract and formal. Illegality is a normative concept without concern for its factual and material content. It is a purely legal, and in that sense ‘ideal’, category which applies to the realm of validity, not to the realm of efficacy.

²⁶⁹ Schmitt, *On the Three Types*, 2004, p. 53.

²⁷⁰ Schmitt, *On the Three Types*, 2004, p. 52 ff.

²⁷¹ Schmitt, *On the Three Types*, 2004, p. 53.

²⁷² Schmitt, *On the Three Types*, 2004, p. 53.

²⁷³ Schmitt, *On the Three Types*, 2004, p. 53.

²⁷⁴ Kelsen *Introduction to the Problems of Legal Theory* (1992), p. 62.

²⁷⁵ Kelsen, *The Pure Theory of Law*, trans. Max Knight, University of California Press: Berkeley/Los Angeles/London, 1970 [1960], p. 212, italics in original.

What I aim to do in the remainder of this Chapter is to reconstruct Schmitt's political and legal philosophy in a way that illuminates the passage that leads him from the normative realm of security to its sources in an existential, properly ontological, realm. If Kelsen would thematize security in terms of the legal/illegal distinction, Schmitt will argue that security is about the self-preservation of a collective over and against the strange which threatens its continued existence. The passage from the normative to the existential accounts of security is complex and requires several steps. Initially, we will identify the concept of public order as the legal manifestation of an existential concept of security. Public order is the legal concept in which the existential concept of insecurity acquires its most pregnant form. A second step takes us from public order to the notion of concrete order.

2.3 Public Order: Article 48 of the Weimar Constitution

In contrast to normativism, Schmitt claims that security should not be reduced to the problem of illegality; instead, it becomes an issue when public order is at stake. The notion of public order is, in Schmitt's view, the legal category which thematizes collective security. In this section, I will explore the notion of public order as it features in his interpretation of Article 48 of the Weimar Constitution in view of identifying elements of the existential concept of security.

Whereas Schmitt doesn't deal with the concept of security explicitly, the notion of public order features in nearly all of his writings, in which he uses different phrasings such as 'public order and security' (*'öffentliche Ordnung und Sicherheit'*) and 'peace, security and order' (*'Ruhe, Sicherheit und Ordnung'*). The basic reference of the notion of public order in Schmitt's work is Article 48 of the Weimar Constitution, which concerns the emergency powers of the *Reichspräsident*. This is not surprising since Article 48 was a much discussed constitutional problem in Schmitt's days.²⁷⁶ Nevertheless, Schmitt's writings show a special interest in Article 48; it occupies an important position within the context of his political and legal philosophy. Indeed, as Kelsen notes, to the extent that Schmitt's theoretical enterprise can be read as a sustained reflection on the Weimar Constitution, we could say that it finds its culmination in Article 48.²⁷⁷ Schmitt develops a comprehensive interpretation of article 48 in the appendix to the second edition of his book on dictatorship, an interpretation that was originally written as a contribution to the first annual meeting of the Association of German Constitutional Lawyers in 1924.²⁷⁸

²⁷⁶ For a comprehensive historical account of public law debates in the Weimar Republic, see Michael Stolleis, *A History of Public Law in Germany 1914-1945*, trans. Thomas Dunlap, Oxford University Press: Oxford, 2004.

²⁷⁷ Hans Kelsen, 'Wer soll der Hüter der Verfassung sein?', in: H. Klecatsky, R. Marčić & Schambeck (eds.), *Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkel und Alfred Verdross* (Band II), Europa Verlag: Wien, 1968 [1931], pp. 1873-1922, especially p. 1920.

²⁷⁸ Carl Schmitt, 'The Dictatorship of the Reich president according to Art 48 of the Reich constitution', trans. E. Kennedy, *Constellations*, vol. 18, no. 3, 2011 [1927], pp. 299-323. For an analysis of the debate on Article 48 at the Jena conference in 1924, see Marc de Wilde, 'The state of emergency in the Weimarer Republic. Legal disputes over Article 48 of the Weimar Constitution', *Tijdschrift voor Rechtsgeschiedenis*, vol. 78, 2010, pp. 135-158 and Ellen Kennedy, 'Emergency Government Within the Bounds of the Constitution: An Introduction to Carl Schmitt, "The Dictatorship of the Reich president according to Article 48 R.V."', *Constellations*, vol. 18, no. 3, 2011, pp. 283-297.

Before considering Schmitt's interpretation of Article 48, let me first briefly discuss the interpretation against which he takes up a polemic position, namely, the standard interpretation of Article 48 as developed by Richard Grau. Schmitt's polemic with the standard interpretation focuses on the relation between the first and second sentence of the second section of Article 48, which consists of five sections in total. The second section of Article 48 of the Weimar Constitution reads as follows:

'[1] If in the German *Reich* the public security and order are significantly disturbed or endangered, the President can utilize the necessary measures to restore public security and order, if necessary with the aid of armed forces. [2] For this purpose, he may provisionally suspend, in whole or in part, the basic rights established in Articles 114 [inviolability of person], 115 [inviolability of domicile], 117 [secrecy of communication], 118 [freedom of opinion and of expression thereof], 124 [freedom of assembly], and 153 [inviolability of property].'²⁷⁹

The standard interpretation suggests that sentence [2] has a limiting function to the emergency power of the *Reichspräsident* as provided in sentence [1], meaning that all articles of the Weimar Constitution are to be considered non-derogable, with the exception of the articles enumerated in sentence [2]. In Grau's interpretation, the addition of the sentence [2] can only mean that the *Reichspräsident* 'should be permitted to do something which is not yet included in his power to take the necessary measures'.²⁸⁰ Therefore, if the emergency power of the *Reichspräsident* is restricted in a general sense by the inviolability of the Weimar Constitution, sentence [2] authorizes him to suspend the provisions of the enumerated fundamental rights. In this sense, Grau notes, sentence [2] involves 'an exception to a limitation'.²⁸¹ At stake in Grau's interpretation of Article 48 is the protection of the fundamental rights of individuals against the state. As we will see, Schmitt's interpretation takes the opposite direction, sacrificing fundamental rights for the sake of safeguarding the existence of a collective as a unity.

Schmitt's interpretation of Article 48 takes off by determining the purpose of the authority granted to the *Reichspräsident*. According to Schmitt, the purpose of the emergency power of the *Reichspräsident* is the restoration of public security and order. 'The text merely says: for the purpose of restoring public security and order, the *Reichspräsident* can take measures and he may suspend certain fundamental rights'.²⁸² So, in Schmitt's view, the purpose

²⁷⁹ 'Der Reichspräsident kann, wenn im Deutschen Reiche die öffentliche Sicherheit und Ordnung erheblich gestört oder gefährdet wird, die zur Wiederherstellung der öffentlichen Sicherheit und Ordnung nötigen Maßnahmen treffen, erforderlichenfalls mit Hilfe der bewaffneten Macht einschreiten. Zu diesem Zwecke darf er vorübergehend die in den Artikeln 114, 115, 117, 118, 123, 124 und 153 festgesetzten Grundrechte ganz oder zum Teil außer Kraft setzen.' The translation derives from Schmitt, *Constitutional Theory*, 2008, p. 417. The sentence numbering, [1] and [2], is mine.

²⁸⁰ Richard Grau, *Die Diktaturgewalt des Reichspräsidenten und der Landesregierungen: auf Grund des Artikels 48 der Reichsverfassung*, Otto Liebman: Berlin, 1922, p. 51, my translation, MB.

²⁸¹ Grau, *Die Diktaturgewalt des Reichspräsidenten*, 1922, p. 51, my translation, MB.

²⁸² Schmitt, 'The Dictatorship of the Reich president', 2011, p. 304.

of Article 48 can be defined as the restoration of normal order. This is to say, if ‘the constitution says what the normal order in the state is’²⁸³, then, in Schmitt’s interpretation, the constitutional authority of the *Reichspräsident* enables him to redress an abnormal situation. Schmitt points out that this interpretation of Article 48 essentially has two implications. First, that the emergency power of the *Reichspräsident* is ‘a constitutionally foreseen authority’.²⁸⁴ And second, related to the first, that Article 48 provides for the exception (*Ausnahme*) as a ‘constitutional legal institution’ (*verfassungsmäßiges Rechtsinstitut*).²⁸⁵

As to the first point, concerning the idea that the emergency power of the *Reichspräsident* is a constitutionally foreseen authority, Schmitt claims that the Weimar Constitution includes commissarial dictatorship.²⁸⁶ Schmitt distinguishes between two forms of dictatorship, namely commissarial and sovereign dictatorship. Whereas commissarial dictatorship suspends the legal order in order to preserve it as a whole, sovereign dictatorship first constitutes legal order. ‘The commissarial dictatorship is the unconditioned action commissioner of a *pouvoir constitué*, the sovereign dictatorship the unconditioned action commission of a *pouvoir constituant*’.²⁸⁷ As a consequence, commissarial and sovereign dictatorships have a different constitutional meaning. If commissarial dictatorship is constitutionally limited, sovereign dictatorship is constitutionally unlimited and hence is incompatible with a ‘constitutional legal order’ (*rechtstaatlichen Verfassung*).²⁸⁸

‘The rightful plenipotency of a constitutional assembly rests on its exercise of the *pouvoir constituant*, a supreme power lasting only until the constitution comes into effect. In the moment when the assembly completes its work and the constitution becomes effective law, its sovereign dictatorship ends, as does the possibility of a sovereign dictatorship at all.’²⁸⁹

Despite this difference between commissarial and sovereign dictatorship, Schmitt perceives them as two forms of dictatorship because they both have a temporary nature; they both indicate a transitional regime.²⁹⁰ Commissarial dictatorship is the constitutional enshrined authority for bringing about the transition from the abnormal situation into normal order. Sovereign dictatorship on the other hand effectuates the transition from legal chaos into legal order. In this sense, the *Ausnahmezustand* basically has two meanings: the state of emergency

²⁸³ Schmitt, ‘The Dictatorship of the Reich president’, 2011, p. 314.

²⁸⁴ Schmitt, ‘The Dictatorship of the Reich president’, 2011, p. 310.

²⁸⁵ Schmitt, ‘The Dictatorship of the Reich president’, 2011, p. 310, translation altered.

²⁸⁶ Whereas Article 48 can be defined *de jure* as a commissarial dictatorship, it was *de facto* far more than that. As Schmitt notes, on the basis of Article 48 the commissarial dictatorship could in fact act as ‘a residue of the National Assembly’s sovereign dictatorship’ (Schmitt, ‘The Dictatorship of the Reich president’, 2011, p. 313). The reason for this is that Article 48 was foreseen to include a section 5 for regulating the state of emergency in further detail. However, in Schmitt’s view, the adoption of section 5 has been deliberately postponed in order to enable the *Reichspräsident* to respond to the abnormal circumstances of the Weimar Republic.

²⁸⁷ Carl Schmitt, *Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf*, Duncker & Humblot: München/Leipzig/Berlin, 1921, p. 146, my translation, MB.

²⁸⁸ Schmitt, ‘The Dictatorship of the Reich president’, 2011, p. 311, translation altered.

²⁸⁹ Schmitt, ‘The Dictatorship of the Reich president’, 2011, p. 311.

²⁹⁰ Schmitt, *Constitutional Theory*, 2008, p. 130.

(commissarial dictatorship) and the state of exception (sovereign dictatorship). In the emergency situation the commissarial dictatorship is provided with 'a free action space to issue measures that are necessary and effective'²⁹¹ to restore normal order. In the state of exception there is no legal order; normal order first needs to be established.

As to the second point, concerning the fact that the exception is a 'constitutional legal institution', Schmitt argues that the exception is anticipated by and therefore an intrinsic part of the legal order. As Schmitt sees it, 'in every legal atom . . . there remains a structure that assumes an abnormal situation, different from the law that should apply to the normal situation'.²⁹² This means that the exception, as the legal manifestation of abnormality, 'presumes the continued validity of that norm from which it deviates. It belongs to the concept of the exception that it intervenes without setting aside, and deviates without superseding'.²⁹³ In other words, the exception challenges the legal norms that apply to normal order and therefore at the same time presupposes their validity.

To the extent that the exception calls into question the normativity of the legal order, Schmitt claims that it can only be responded to by a measure (*Maßnahme*), not by a law (*Gesetz*) in the proper sense of the word. Whereas a law is a general norm with a proper legal form, the measure that the *Reichspräsident* can proclaim lacks the formal status of a law in that its content is bound to a concretely given situation. 'The characteristic of a measure . . . consists in its dependence on concrete circumstances . . . Its extent, i.e. content, procedure, and effect, are determined from case to case by the circumstances'.²⁹⁴ So, the measure has a legal effect similar to a law and in that sense legal validity, but only for the period during which the abnormal situation exists. This temporary and context-dependent nature of the measure's validity makes it fundamentally different from proper legal norms.

The distinction between the legal status of the measure and a proper law is central to Schmitt's alternative interpretation of the relation between sentences [1] and [2] of the second section of Article 48. As stated in sentence [1], the *Reichspräsident* can take measures, and not laws, to restore public security and order. Indeed, as Schmitt notes, 'the *Reichspräsident* is not a legislator'.²⁹⁵ While sentence [1] provides the *Reichspräsident* with a general authority to take the necessary measures that intervene in but do not supersede the legal order, Schmitt argues that sentence [2] provides a competence that is not contained in the competence of sentence [1], namely the suspension of the enumerated fundamental rights. According to Schmitt, the competence to suspend the fundamental rights enumerated in sentence [2] of the second section of Article 48 is, from a legal point of view, more far reaching than the competence to deviate from them. In *Constitutional Theory* Schmitt provides a clear definition of what he takes to be the legal meaning of 'suspension'.

²⁹¹ Carl Schmitt, *Legalität und Legitimität*, Duncker & Humblot: München/Leipzig, 1932, p. 75, my translation, MB.

²⁹² Schmitt, 'The Dictatorship of the Reich president', 2011, p. 319.

²⁹³ Schmitt, 'The Dictatorship of the Reich president', 2011, p. 305, translation altered.

²⁹⁴ Schmitt, 'The Dictatorship of the Reich president', 2011, p. 317, translation altered.

²⁹⁵ Schmitt, 'The Dictatorship of the Reich president', 2011, p. 318.

“The suspended constitutional provision has no validity for the time of its suspension . . . The suspension does not mean a rupture in the individual case, for no valid statutory provision is violated. Put more precisely, its validity is not eliminated. Nor is there a change, for after the termination of the possible suspension, which is always only temporary, the suspended provision again enters into force unchanged.”²⁹⁶

In short, whereas the validity of the legal order remains intact in the case of a measure, the competence provided in sentence [2] implies the suspension of the validity of the enumerated fundamental rights.

So, if the prevailing interpretation suggests a close connection between sentences [1] and [2], considering sentence [2] as an additional competence to the constitutionally limited emergency powers of the *Reichspräsident*, Schmitt, on the other hand, pulls sentences [1] and [2] apart. In his view, in order to redress the abnormal situation, the *Reichspräsident* can take the necessary measures and may also suspend certain fundamental rights. In other words, the *Reichspräsident* has, in Schmitt’s view, the ‘general authority’ to take measures and the ‘specific authority’ to suspend the enumerated fundamental rights.²⁹⁷ The contrast between the standard interpretation and Schmitt’s is revealing. Whereas the former emphasizes the limited emergency powers of the *Reichspräsident*, the latter points to their indeterminacy and in that sense their relatively unlimited character. Instead of focusing on the protection of the fundamental rights of individuals, Schmitt sacrifices them completely for the sake of restoring normal order.

Notice the implication that follows from Schmitt’s reading of Article 48 with respect to the scope of (in)security. Kelsen, as we have seen, argues that references to a collective subject involve a hypostasis. As a result, he is not prepared to countenance the notion of collective security or insecurity, at least to the extent that these categories would involve a claim about the existence of a collective independent of a legal order. By embracing Weber’s methodological individualism, Kelsen’s normativism can accommodate, in its own way, a concept of (in)security that focuses strictly on individuals. Precisely for this reason, Kelsen’s normativism can be construed in a way that offers staunch support for fundamental rights and constitutionalism, as key elements of individual security. Schmitt, by contrast, subordinates individual security to the security of the collective: fundamental rights, and individual security in their wake, must give way when public order is at stake, i.e. when the existence of a collective is challenged. If Kelsen’s critique of collective subjectivity only leaves room for individual security, Schmitt’s critique of normativism only can accommodate collective security.

There is a second reason for which Schmitt’s discussion of Article 48 is interesting as concerns the concept of security. Indeed, as we have seen, the backbone of his interpretation of Article 48 is the notion of public order in terms of *normal order* and the exception thereto—the abnormal. We can already see here how Schmitt is moving away from the normativist interpretation of security, which, in Kelsen’s reading, turns on the sharp distinction

²⁹⁶ Schmitt, *Constitutional Theory*, 2008, p. 157.

²⁹⁷ Schmitt, ‘The Dictatorship of the Reich president’, 2011, p. 306.

between validity and efficacy, normativity and factuality. By introducing the notions of normality and abnormality, Schmitt offers an existential alternative to this normativist distinction. In effect, if, negatively, Schmitt's analysis of Article 48 can be read as an argument against the claim that a state is a closed system of norms, it can also be read, positively, as an argument in favor of the claim that a state is a concrete order.

2.4 Concrete Order

My aim in this section is to unpack the notion of concrete order, which is pivotal to the shift which Schmitt seeks to make from a normativist to an existential concept of the state, and therewith from a normativist to an existential concept of security. I refer to concrete order as 'pivotal' because, on the one hand, it spells out what is involved in the *publicness* of public order, and, on the other, because it anticipates the fundamental, properly *ontological* characterization of collective subjectivity in terms of the distinction between the own and the strange, the friend and the enemy. It is this properly existential distinction, in the strict sense of the continued existence or the turn to non-existence, which marks what is properly at stake, according to Schmitt, in the concept of collective security. While concrete order is a recurrent theme in Schmitt's writings, he doesn't offer a systematic account thereof which illuminates its diverse facets and features. Accordingly, I will reconstruct Schmitt's concept of concrete order, exploring it from the following perspectives: as institution; as normal order; as homogeneity; and as a *nomos*. These facets give content to the 'concreteness' of concrete order and prepare the way for the discussion of security as an existential concept and its associated distinctions between friend and enemy, the own and the strange.

2.4.1 As Institution

The notion of concrete order as institution is important because it allows Schmitt to develop a concept of state which is alternative to its purely normative characterization as a legal order. Schmitt refers to the notion of concrete order in passing in *Constitutional Theory*: 'the concept of legal order contains two entirely different elements: the normative element of law and the actually existing element of concrete order. The unity and order lies in the political existence of the state, not in statutes, rules and just any instruments containing norms'.²⁹⁸ Although a more developed account of the concept of concrete order will have to wait till Schmitt's later essay, *On the Three Types of Juristic Thought*, in *Constitutional Theory* he already provides an incipient account of concrete order that draws on a specific reading of Aristotle's notion of state.

Central to Aristotle's notion of state is, in Schmitt's interpretation, the concept of order, which defines the existential unity of a collective.

'According to Aristotle, the state (*πολιτεία*) is an order (*τάξις*) of the naturally occurring association of human beings of a city (*πόλις*) or area. The order involves dominion in the state and how it is organized. By virtue of the order, there is a ruler

²⁹⁸ Schmitt, *Constitutional Theory*, 2008, p. 65, translation altered.

(κόσμος). However, a component of this order is its living goal (τέλος), which is contained in the actually existing individuality of the concrete political formation'.²⁹⁹

The Aristotelian concept of state, in Schmitt's reading thereof, highlights four elements that are constitutive of the state as a concrete order: (1) a natural association of human beings, (2) an area, (3) dominion, and (4) a living goal. The first element suggests that the people who constitute the state have a natural social bond. The second element is the notion of an area (πόλις, *Gebiet*). This means that a state can be defined as an order if it is a spatial unity. The third element highlighted by Aristotle's definition of state is dominion (*Herrschaft*). The power over human beings is centralized; it is in the hands of a ruler. Lastly, the fourth element is the living goal. This living goal embodies the aspiration of naturally associated individuals to exist as a unity. In Schmitt's view, the state is not simply an agreement between the individual will and the collective will. Instead, the individual wills are integrated into a collective will in that they are oriented towards realizing the living goal of the state.

If Aristotle is the point of departure for Schmitt's initial, largely implicit, attempt to conceptualize the state as a concrete order, Maurice Hauriou is his new interlocutor in the short essay, *On the Three Types of Juristic Thought*. Indeed, Schmitt's interpretation of the state as a concrete order can be read as a certain, even idiosyncratic, reception and transformation of Hauriou's theory of institution. Before turning to discuss Hauriou's theory of institution, and how it informs the concept of concrete order, I wish to lodge three caveats. The first is that while Schmitt refers to Hauriou's concept of institution, he does not develop it in detail. The notion of institution provides what Schmitt takes as the principle of unity of concrete order. But Schmitt indicates, rather than carefully elaborates, this point in his essay *On The Three Types of Juristic Thought*.³⁰⁰ By examining Hauriou's concept of institution I will fill this lacuna in Schmitt's definition of concrete order. In this respect, my reading of Schmitt's concept of concrete order is constructive rather than reconstructive. Secondly, although drawing explicitly on Hauriou, Schmitt prefers the concepts of concrete order and empire (*Reich*) to the concepts of institution and state. Schmitt prefers the former because he sees Hauriou's theory of institution as the French equivalent of the German, Hegelian tradition of concrete order thinking, in fact an insight that he attributes to the National-Socialist movement.³⁰¹ Undeniably, this framing makes the concept of concrete order extremely fraught from a historical point of view. However, I am interested here in Schmitt's *conceptual* analysis of concrete order. Despite the fact that Schmitt's conceptual analysis and historical framing of concrete order are closely related, I agree with Croce and Salvatore that they can be treated as separate questions.³⁰² Third and lastly, although I will interpret Schmitt's concrete order thinking as a form of institutionalism, I will not attempt to situate either Hauriou or Schmitt within the larger debate

²⁹⁹ Schmitt, *Constitutional Theory*, 2008, p. 60, translation altered.

³⁰⁰ Croce & Salvatore, *The Legal Theory of Carl Schmitt*, 2013, p. 68 ff.

³⁰¹ Schmitt, *On the Three Types*, 2004, p. 90.

³⁰² Croce & Salvatore, *The Legal Theory of Carl Schmitt*, 2013, p. 32.

about institutionalism,³⁰³ nor will I link it to contemporary contributions to neo-institutionalism.³⁰⁴ In the forthcoming, I am only interested in Schmitt's concept of concrete order and its relation to institutionalism in so far as it provides the key to an existential concept of security.

The fundamental problem of Hauriou's theory of institution is the organizational formation of a social group. What renders a manifold of individuals into a social group, into a unity? Developing his concept of institution in a French context influenced by Henri Bergson's vitalist philosophy,³⁰⁵ Hauriou defines social groups in terms of 'social organisms'.³⁰⁶ Like biological organisms, social groups are endowed with an inner force that is determinative of their slow, continual movement of conservation and transformation. In this sense, an organism can be defined as 'a system whose form subsists despite the continual renewal of its matter'.³⁰⁷ Hauriou argues that a social group can be considered a living organism only if it has some form of organization, i.e. an organization that preserves itself, even if the social group undergoes transformations of its 'human matter' (*matière humaine*).³⁰⁸ So, in Hauriou's view, an institution is a social group with a form of organization. Since I will discuss Hauriou's theory of institution in what follows only in so far that it contributes to clarifying Schmitt's definition of concrete order, my analysis of Hauriou's concept of institution is restricted to what he calls the category of 'personified' or 'corporate institutions', i.e. the category of institutions that includes the state.³⁰⁹ Yet my discussion does not lead to a truncated reading of Hauriou's concept of institution since he assumes the state to be the basic model of an institution. The state, Hauriou submits, is 'the perfect organization' of a stable institution.³¹⁰

Hauriou identifies three elements of the organizational formation of a social group: (a) a 'working idea' (*idée d'oeuvre*) or directing idea (*idée directrice*), (b) an organized power of government, and (c) manifestations of communion. In the article 'The theory of the institution and of foundation' (*La Théorie de l'institution et de la foundation*), Hauriou provides a succinct definition of his key concept,

'an institution is a working idea or enterprise that is realized and endures juridically in a social milieu; for the realization of this idea, a power is organized that equips it with organs; on the other, manifestations of communion occur among the members

³⁰³ This is the reading of Schmitt espoused by Mariano Croce and Andrea Salvatore. See Croce & Salvatore, *The Legal Theory of Carl Schmitt*, 2013, their article 'Ethical Substance and the Coexistence of Normative Orders. Carl Schmitt, Santi Romano, and Critical Institutionalism', *Journal of Legal Pluralism & Unofficial Law*, nr. 56, 2007, pp. 1-32 and Croce's article 'Does legal institutionalism rule out legal pluralism? Schmitt's institutional theory and the problem of concrete order', *Utrecht Law Review*, vol. 7, no. 2, 2011, pp. 42-59.

³⁰⁴ Notably, Neil MacCormick & Ota Weinberger, *An Institutional Theory of Law. New Approaches to Legal Positivism*, Kluwer: Dordrecht, 1986; Massimo La Torre, *Law as Institution*, Springer: Dordrecht, 2010.

³⁰⁵ Marcel Waline, 'Maurice Hauriou', trans. Mary Welling, in Albert Broderick (ed.), *The French Institutionalists. Maurice Hauriou, Georges Renard, Joseph T. Delos*, Harvard University Press: Cambridge, 1970 [1930], pp. 139-160, especially p. 141.

³⁰⁶ Maurice Hauriou, *Précis de Droit Constitutionnel*, Recueil Sirey: Paris, 1929, p. 71, my translation, MB.

³⁰⁷ Hauriou, *Précis de Droit Constitutionnel*, 1929, p. 71, my translation, MB.

³⁰⁸ Hauriou, *Précis de Droit Constitutionnel*, 1929, p. 73, my translation, MB.

³⁰⁹ Maurice Hauriou, 'The Theory of the Institution and the Foundation: A Study of Social Vitalism', trans. Mary Welling, in Albert Broderick (ed.), *The French Institutionalists. Maurice Hauriou, Georges Renard, Joseph T. Delos*, Harvard University Press: Cambridge, 1970 [1925], pp. 93-124.

³¹⁰ Hauriou, *Précis de Droit Constitutionnel*, 1929, p. 76, my translation, MB.

of the social group interested in the realization of the idea, which are directed by the organs of power and regulated by procedures.³¹¹

Crucially, in Hauriou's view, an institution presupposes 'an interested group' (*un groupe d'intérêts*) of people that functions as the 'bearer' (*porteur*) of the directing idea.³¹²

'the ascendancy of the working idea of the work and the interest the members have in its realization play a great role in that they explain the voluntary element in the support of these members. These interested members are adherents who run a personal risk in the success or failure of the enterprise.'³¹³

Let me briefly dip into the three elements of an institution: (1) the directing idea, (2) the organization of power and (3) manifestations of communion. As concerns the first element, the directing idea is what renders the interested group into 'a social individuality'³¹⁴ (*une individualité sociale*) with a 'common vision'³¹⁵ (*vision commune*) for which the members are willing to risk their lives. In this sense, the directing idea is the 'soul' of the social group qua institution.³¹⁶ Importantly, Hauriou argues that the directing idea of an institution cannot be reduced to the notion of an end or function.³¹⁷ Whereas an end or function is fully determined and can be fully realized, at least in principle, the directing idea is fundamentally underdetermined, thus will always retain its openness. Therefore, Hauriou's definition of state cannot be reduced to a functionalist understanding of state as, for example, in Weber and Kelsen. Instead, in Hauriou's interpretation, the state includes both an ideal and a functional aspect.³¹⁸

As regards the second element of an institution, the organization of power, Hauriou identifies two principles, to wit the separation of powers and the representative regime. The separation of powers assures that governmental power is not 'a simple force' but 'a rightful power' (*un pouvoir de droit*).³¹⁹ Furthermore, an institution requires a representative regime. 'The governmental power of a corporate institution must act in the name of the body; its decisions must be considered as those of the body itself. The body is nothing without its organs, and it will only through them . . .'³²⁰ This means that representation is a 'technique' to realize the

³¹¹ Hauriou, 'The Theory of the Institution', 1970, p. 99, translation altered.

³¹² Hauriou, 'The Theory of the Institution', 1970, p. 104.

³¹³ Hauriou, 'The Theory of the Institution', 1970, p. 104.

³¹⁴ Hauriou, 'The Theory of the Institution', 1970, p. 103.

³¹⁵ Hauriou, 'The Theory of the Institution', 1970, p. 105.

³¹⁶ Hauriou, *Précis de Droit Constitutionnel*, 1929, p. 73, my translation, MB.

³¹⁷ Hauriou, 'The Theory of the Institution', 1970, p. 102.

³¹⁸ With regard to the institution of the state, Hauriou identifies the administration with the functional aspect and the political government with the directing idea: 'The separation of these two functions is striking in the state. There is the domain of function: the administration and a determined group of public services. Then there is the domain of the directing idea: the political government, which works in the undetermined area' (Hauriou, 'The Theory of the Institution', 1970, p. 102).

³¹⁹ Hauriou, 'The Theory of the Institution', 1970, p. 105.

³²⁰ Hauriou, 'The Theory of the Institution', 1970, p. 105.

directing idea of an institution.³²¹ To the extent that an institution consists of a group of individuals, it requires representation to assure the realization of the directing idea.

The third and last element of an institution is the manifestation of communion among the members of the group. Manifestations of communion are rooted in both the 'intellectual assent'³²² of the members to the directing idea and 'common emotions'³²³ that the members have as a group. Crucially, the manifestations of communion suggest that the members of the social group can experience their existence as a unity in an immediate sense. To the extent that a social group has both an intellectual and an emotional bond, it can be regarded as 'a communion of action' (*une communion d'action*).³²⁴ An example of the manifestation of a social group as a communion of action is acclamation.³²⁵ While speaking of manifestations of communion, Hauriou makes clear, however, that there is no such thing as a collective conscience. The manifestations of communion, Hauriou notes, 'cannot in any sense be analyzed as manifestations of a collective conscience; it is individuals who are moved by their contact with a common idea and who . . . become aware of their common emotion'.³²⁶ Moreover, Hauriou adds that manifestations of communion are not continuously lived by the group members; 'they are brief moments separated by long intervals between rapid flashes of light that fade away in the night'.³²⁷

According to Hauriou, the elements of the organized power of government and the manifestations of communion represent, respectively, the objective and subjective dimensions of the institution that 'interiorize' the directing idea.³²⁸ On the one hand, Hauriou identifies the governmental organization as the 'objective individuality' of the institution.³²⁹ The governmental structure embodies the directing idea of an institution in an objective sense. Manifestations of communion, on the other hand, are identified as the personification of the directing idea of the institution. Through the intellectual and emotional bond, the directing idea is interiorized by the group members. The double process of interiorization, objective and subjective, guarantees the continuity of an institution.

Hauriou's notion of institution displays some overlap with Schmitt's Aristotelian reading of state, but is also complementary thereto. First of all, Hauriou's notion of the directing idea corresponds to the Aristotelian element of the living goal, *telos*. The living goal or directing idea integrates the group of individuals into a unity. As the integrating principle of a social group, the directing idea represents, in Schmitt's interpretation, the 'inner measure' of a concrete order, as he calls it. In this respect, Schmitt's speaks of 'the specific legal essence' (*das spezifische rechtliche Wesen*), the 'own legal substance' (*eigene rechtliche Substanz*), and the 'own, inner order' (*eigenen, inneren Ordnung*) of concrete order.³³⁰ As the inner measure, the directing idea

³²¹ Hauriou, 'The Theory of the Institution', 1970, p. 105.

³²² Hauriou, 'The Theory of the Institution', 1970, p. 108.

³²³ Hauriou, 'The Theory of the Institution', 1970, p. 107.

³²⁴ Hauriou, 'The Theory of the Institution', 1970, p. 108.

³²⁵ Hauriou, 'The Theory of the Institution', 1970, p. 107.

³²⁶ Hauriou, 'The Theory of the Institution', 1970, p. 107.

³²⁷ Hauriou, 'The Theory of the Institution', 1970, p. 113.

³²⁸ Hauriou, 'The Theory of the Institution', 1970, p. 109 ff.

³²⁹ Hauriou, 'The Theory of the Institution', 1970, p. 109.

³³⁰ Schmitt, *On the Three Types*, 2004, p. 54, translation altered.

provides a ‘suprapersonal’ (*überpersönlich*) perspective as concerns legal order rather the ‘impersonal’ (*unpersönlich*) perspective advocated by normativism.³³¹ In this respect, the notion of the directing idea or *telos* provides a crucial element to make sense of a concrete order as an existential unity of a collective subject in the specific sense of an acting unity. Another element that reveals overlap between Aristotle’s notion of state and Hauriou’s concept of institution is the centralized form of dominion by means of a ruler (*kratos*) or a government. The ruler or government is responsible for the realization of the living goal or directing idea of the social group. Importantly, Hauriou claims that a centralized government implies representation. The government acts ‘in the name of’ the group as a whole. This is something that is not necessarily the case in Schmitt’s Aristotelian interpretation of state. According to Schmitt, the Aristotelian notion of state assumes ‘the *simultaneity* of ruling and being ruled’ and thus can be conceived without the mediation of representation, at least in principle.³³² Thirdly, the element of the natural association of human beings in Aristotle can be taken to correspond to what Hauriou intellectual and emotional bond of a social group. That is, whereas Aristotle emphasizes that the bond between the members of a group is natural, Hauriou points to its immediacy. This is an important point for Schmitt, as it suggests that the members of a state can be immediately self-present to themselves as a unity. We will return to this point when discussing the contrast between identity and representation, in Chapter 3. There is also an element of Schmitt’s Aristotelian interpretation of state that does not reappear in Hauriou’s concept of institution, namely its spatial dimension. Schmitt fills this gap in Hauriou’s concept of institution in *The Nomos of the Earth*, which we will turn to discuss in a minute.

What is perhaps most important in Schmitt’s reception of Aristotle and Hauriou is that it introduces the concept of collective subjectivity into a theory of the state and, therewith, into a theory of security. Remember that Kelsen, endorsing Weber’s methodological institutionalism, refused to accept the assumption that the state, qua unity, exists in the form of a collective subject. Such a move, or so Kelsen argues, amounts to a hypostasis. Aristotle’s *politeia*, and Hauriou’s institution offer Schmitt the conceptual framework he requires for arguing that the state is a collective subject and, as such, an existential unity. To effect the passage from a normative theory of the state as a unity of legal norms to a political theory in which the state is a concrete order or unity is to effect the passage from a basic norm, as the ground of a legal order, to a collective subject, as its ground. This passage is the key to Schmitt’s political reading of public order and to his existential concept of security, even if the latter’s features still remain unclear at this stage of our argument.

2.4.2 As Normal Order

Schmitt also carries forward Hauriou’s notion of an institution by defining concrete order as normal order. Indeed, central to Schmitt’s interpretation of Hauriou’s notion of institution is a problem that we have already encountered in his analysis of Article 48 of the Weimar Con-

³³¹ Schmitt, *On the Three Types*, 2004, p. 49.

³³² Schmitt, *Constitutional Theory*, 2008, p. 249, emphasis added, MB.

stitution. The definition of concrete order as the condition of ‘effective normality’ of a collective is quite complex in that the notion of normality is ambiguous. Normality is not only a descriptive category that reflects a factual condition but is also a normative category in that it pertains to an ideal condition.³³³ This means that the condition of ‘effective normality’ refers to the factual condition of concrete order and is at the same time inherently normative. Actually, as we will see, it is precisely because of this ambiguous character, both factual and normative, that Schmitt replaces the Kelsen’s distinction between validity and efficacy with normality.

In the essay *On the Three Types of Juristic Thought*, Schmitt defines the notion of normality in a twofold sense, distinguishing between the ‘normal situation’ (*normale Situation, normal unterstellten Lage, Normal-Situationen*) and the ‘normal type of man’ (*normaler Mensch, normal unterstellten Menschentypus, Normal-Typen*).³³⁴ Let me start with Schmitt’s definition of the normal situation. First of all, in the normal situation the behavior of a social group proceeds according to the ‘regularities’ (*Regelmäßigkeiten*) of a concrete order, regularities that materialize the concrete order’s inner measure.³³⁵ Put differently, in the normal situation behavior appears as ‘natural’ in that it is in conformity with the rules of a concrete order.³³⁶ Schmitt argues that ‘the various customs, regularities, and calculations within such orders cannot and should not seize and consume the essence (*Wesen*) of this order, but only serve it’.³³⁷ This means that the effective normality of a concrete order can never be reduced to a sum of rules and functions. It is not surprising that Schmitt takes regularity as an element of the normal situation. For the idea of regularity is etymologically rooted in the concept of normality: normal is that which is in accordance with the rule.³³⁸ Furthermore, we could add that Schmitt’s definition of the ‘normal situation’ includes the aspect of duration. Normal order represents a stabilized whole of rules and regularities that are characteristic of the existence of a social group over time. It is also in this sense that we can speak of concrete order as collective subjectivity. Normal order refers to the rules and regularities that are constitutive of the social groups as an acting unity.

The second element of normal order is the ‘normal type of man’. This is arguably the most problematic assumption of Schmitt’s concept of concrete order, as it implies a reification of Hauriou’s notion of an institution. According to Schmitt, the element of the normal type of man implies that the members of a group possess some form of ‘commonality’ (*Gemeinsamkeit*), as he puts it in *Constitutional Theory*.³³⁹ More particularly, in Schmitt’s interpretation, this commonality has a substantial nature; the members of a group share a ‘substantial similarity’ (*substantielle Gleichartigkeit*).³⁴⁰ This means that Schmitt’s notion of substantial similarity implies that the existential unity of a collective subject is a *substantial* unity. Schmitt notes that the

³³³ Georges Canguilhem, *The Normal and the Pathological*, trans. C. R. Fawcett, Zone Books: New York, 2007 [1943], p. 125 ff. See also the article ‘Normal, Normalität’ by F. Kundlien & J. Ritter, in Joachim Ritter & Karlfeld Gründer (eds.), *Historischen Wörterbuch der Philosophie*, Band 6, Schwabe & Co AG: Basel, 1984, pp. 920–928.

³³⁴ Schmitt, *On the Three Types*, 2004, respectively p. 46, p. 56 and p. 65.

³³⁵ Schmitt, *On the Three Types*, 2004, p. 54.

³³⁶ Schmitt, *On the Three Types*, 2004, p. 75.

³³⁷ Schmitt, *On the Three Types*, 2004, p. 54.

³³⁸ Canguilhem, *The Normal and the Pathological*, 2007, p. 125.

³³⁹ Schmitt, *Constitutional Theory*, 2008, p. 262.

³⁴⁰ Schmitt, *Constitutional Theory*, 2008, p. 259 ff.

substantial unity of a social group can be defined in various ways, including ‘ideas of common race, belief, common destiny, and tradition’.³⁴¹ Schmitt will then go ahead and radicalize substantial similarity into the form of racial similarity in his notorious essay published in 1933, entitled *State, Movement, People*.³⁴² Let there be no misunderstanding: I do not wish to defend Schmitt’s interpretation of existential unity in the sense of a substantial unity. Actually, in Chapter 3 I will argue that Schmitt’s reified, hence reductive interpretation of Hauriou’s concept of institution is false, as it is based on a strongly reductive understanding of collective identity.

Now, the notion of normal order provides the key to Schmitt’s redefinition of the normativist distinction between validity and efficacy, normativity and factuality. Replacing the abstract distinction between validity and efficacy with the concrete notion of normality, Schmitt claims that the factual normal order is an intrinsic part of the validity of legal norms. The effective normal order ‘is not merely an external, jurisprudentially disregarded presupposition of the norm, but an inherent, characteristic feature of the norm’s effectiveness and a normative determination of the norm itself’.³⁴³ Pointing out that the effective normal order is the normative ground of legal order, Schmitt aims to reverse the relation between normativity and factuality as assumed by normativism, hence to break down the ‘superiority’ and ‘eminence’ of normativity over factuality.³⁴⁴ For, as Schmitt argues, ‘even if a norm is as inviolable as one wants to make it, it controls a situation only in so far as the situation has not become completely abnormal . . .’³⁴⁵ In other words, by delimiting the validity of norms to the factual normal order, Schmitt aims to re-establish the relation between normativity and factuality. If the validity of the norm is restricted to the factual normal order, the norm is not ‘superior’ to factuality; instead ‘the rule *follows* the changing situation for which it is determined’.³⁴⁶ In this respect, the interplay between normativity and factuality implies that the validity of a norm is only relatively independent from the factual normal order. ‘The norm or rule does not create the order; on the contrary, only on the basis of a given order does it have a certain regulating function with a relatively small degree of validity, independent of the facts of the case’.³⁴⁷

³⁴¹ Schmitt, *Constitutional Theory*, 2008, p. 258.

³⁴² ‘We do not simply know instinctively but also on strictly scientific grounds that all law is the law of a particular people. It is an epistemological truth that only one who is in his existential, characteristic manner part of the law-making community and belongs to it existentially is capable of seeing facts correctly, of hearing statements accurately, of understanding words properly and of valuing impressions of people and things rightly. Down to the deepest, unconscious stirrings of the mind, but also into the smallest brain fiber, is the human being effectively this people and race belongingness (Carl Schmitt, *Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit*, Hanseatische Verlagsanstalt: Hamburg, 1933, p. 45, my translation, MB). According to Armin Adam, the redefinition of *Gleichartigkeit* into *Artgleichheit* marks ‘the culmination of the “existential” argumentation’ (Armin Adam, *Rekonstruktion des Politischen. Carl Schmitt und die Krise der Staatlichkeit 1912-1933*, VCH/Acta Victoria: Weinheim, 1992, p. 114; see also Theo W.A. De Wit, *De onontkoombaarheid van de politiek. De soevereine vijand in de politieke filosofie van Carl Schmitt*, Pompppers: Ubbergen 1992, pp. 188-192).

³⁴³ Schmitt, *On the Three Types*, 2004, p. 56-57; see also *Political Theology*, 1985, p. 13 and *Legalität und Legitimität*, 1932, pp. 71-72 and Carl Schmitt, *The Concept of the Political*, trans. George Schwab, The University of Chicago Press: Chicago/London, 2007 [1932], p. 46.

³⁴⁴ Schmitt, *On the Three Types*, 2004, p. 49.

³⁴⁵ Schmitt, *On the Three Types*, 2004, p. 56.

³⁴⁶ Schmitt, *On the Three Types*, 2004, p. 56, italics in original.

³⁴⁷ Schmitt, *On the Three Types*, 2004, pp. 48-49.

In brief, the crux of Schmitt's definition of concrete order as normal order is that it provides an alternative to the normativist distinction between efficacy and validity,³⁴⁸ a distinction that, in his view, was responsible for emptying the concept of security of its existential content. For whereas normativism conceptualizes security in terms of the formal distinction between legality and illegality, Schmitt makes a case for grounding the concept of security in the distinction between normality and abnormality, that is, normal and abnormal behavior. This means that the notions of legality and illegality should be understood in the concrete sense of, respectively, order and disorder. Illegal behavior is not, in Schmitt's view, a 'free-floating'³⁴⁹ (*freischwebend*) legal category but rather involves a concrete case of disorder, that is, a disruption of normal order.

2.4.3 As Homogeneity

As mentioned, Schmitt provides a twofold definition of normal order. The normal situation concerns the rules and regularities of a concrete order. The normal type of man refers to the substantial similarity of the group members. Now, what is distinctive of normal order from a political perspective is homogeneity. Indeed, according to Schmitt, political unity requires 'homogeneity'.³⁵⁰ Schmitt asserts that homogeneity presupposes a particular notion of identity, to wit identity as 'equality' or 'sameness' (*Gleichheit*).³⁵¹ This suggests that normal order, in its twofold definition of the normal situation and the normal type of man, entails the idea that the group members *do* the same, insofar as they follow the rules of normal order, and *are* the same, in that they share a substantial similarity. Consequently, what is characteristic of normal order is the principle of identity, 'the identity of homogeneous substance' (*der Identität der homogenen Substanz*).³⁵²

In Schmitt's view, to the extent that concrete order presupposes homogeneity, all political thinking 'centers on the idea of *immanence*'.³⁵³ The focus on identity in the sense of homogeneity implies that it is characteristic of politics that it 'orients itself *internally* and not externally'.³⁵⁴ This means that a collective defines itself from within, internally, whence the equivalence of homogeneity and immanence. The link between homogeneity and immanence is crucial for Schmitt as it intimates a 'feeling of . . . belonging (*Zusammengehörigkeit*)'.³⁵⁵ That is, concrete order is experienced by the members as their attachment or belonging to a group, as

³⁴⁸ Croce & Salvatore, *The Legal Theory of Carl Schmitt*, 2013, pp. 35-36. See also my review of Croce's and Salvatore's book in *Netherlands Journal of Legal Philosophy*, vol. 43, no. 1, 2014, pp. 87-90.

³⁴⁹ Schmitt, *On the Three Types*, 2004, p. 73.

³⁵⁰ Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy, MIT Press: Cambridge/London, 1985 [1926], p. 9.

³⁵¹ Schmitt, *Constitutional Theory*, 2008, p. 257.

³⁵² Schmitt, *Constitutional Theory*, 2008, p. 265.

³⁵³ Schmitt, *Constitutional Theory*, 2008, p. 266, italics in original.

³⁵⁴ Schmitt, *Constitutional Theory*, 2008, p. 258, italics in original.

³⁵⁵ Schmitt, *Constitutional Theory*, 2008, p. 262.

the immanent sphere of what is their own. According to Schmitt, different elements can contribute to the ‘quality of belonging’³⁵⁶ such as ‘common language, common historical destiny, traditions and remembrances, and common political goals and hopes’.³⁵⁷

To the extent that a collective exists as a homogeneous unity, Schmitt argues that it is ‘a genuinely present entity in its immediate self-identity’.³⁵⁸ This means that Schmitt defines the existential unity of a collective as an immediate unity. We have already come across the immediacy of the existential unity of a collective in what Hauriou calls ‘manifestation of communion’, of which an example is acclamation. Schmitt confirms this, stating that acclamation comes closest to the idea of the collective subject as an acting unity.³⁵⁹ Importantly, according to Schmitt, the definition of existential unity as immediate unity makes political representation utterly problematic. Although Schmitt agrees with Hauriou that representation is an essential element of an institution, it also implies the possibility of alienating the collective from its political substance. That is, for Schmitt representation essentially means the ‘presentation’³⁶⁰ (*Darstellung*) of the existential unity of a collective. By interpreting ‘existential’ in the reified sense of homogeneity, representation appears indeed as a ‘danger’³⁶¹ to, rather than a constitutive feature of, the existential unity of a collective. It will be our task in Chapter 3 to critically reconsider the concepts of identity and representation, developing them in a way that sheds new and critical light on Schmitt’s concept of collective subjectivity and his ontological interpretation of (in)security.

The interpretation of normal order as homogeneity implies that the distinction between normality and abnormality, which Schmitt takes to be the basic distinction of security, is a thoroughly political distinction. Normal order refers to an existential condition of a collective, to wit homogeneity, which a collective factually is and at the same time aspires to be. Heterogeneity, as the contrasting term of homogeneity, represents a perturbation of concrete order.³⁶² It is in this sense, Schmitt contends, that the distinction between normality and abnormality provides the existential content of (in)security. Another implication is that the notion of homogeneity and its contrasting term, heterogeneity, apply to the existential condition of a collective as a whole. In fact, by claiming that homogeneity is an immediate quality of a collective, (in)security, in Schmitt’s interpretation, is perforce a collective concept. Moreover, and more generally, Schmitt’s discussion of homogeneity and heterogeneity suggests that identity and representation are conceptual building blocks of an existential concept of collective security, as I will argue in Chapter 3.

2.4.4 As a *Nomos*

In the context of Schmitt’s interpretation of Aristotle’s notion of state and Hauriou’s concept of institution I noted that the aspect of spatiality does not appear in the latter. Schmitt fills this

³⁵⁶ Schmitt, *Constitutional Theory*, 2008, p. 258.

³⁵⁷ Schmitt, *Constitutional Theory*, 2008, p. 262.

³⁵⁸ Schmitt, *Constitutional Theory*, 2008, p. 239, italics in original, translation altered, MB.

³⁵⁹ Schmitt, *Constitutional Theory*, 2008, p. 131 and p. 272.

³⁶⁰ Schmitt, *Constitutional Theory*, 2008, p. 241.

³⁶¹ Schmitt, *Constitutional Theory*, 2008, p. 248.

³⁶² Schmitt, *The Crisis of Parliamentary Democracy*, 1985, p. 9.

gap in Hauriou's concept of institution in *The Nomos of the Earth*, defining spatiality as a constitutive element of concrete order. The importance of calling attention to the spatiality of the state is that it provides an important insight into the existential concept of security: to secure a collective is to *enforce* the boundary which separates the state as an inside in contrast to an outside. We will critically examine and transform this idea in the closing pages of this thesis, when discussing the problem of illegal immigration in the context of the EU's Area of Freedom, Security and Justice.

Schmitt's analysis of law as a *nomos* focuses on the constitutive role of spatiality with regard to concrete order. Indeed, one of the aims of Schmitt's analysis of *nomos* is to critique the normativist understanding of space as a 'sphere of validity'.³⁶³ For Schmitt, this is needlessly abstract and reductive of the concrete meaning of space as the 'solid ground'³⁶⁴ of human coexistence. In Schmitt's view, space is first and foremost the protected space of a social group and the space that serves as a social group's condition of subsistence. It is this sense of concreteness – disregarded as it is by normativism and by the doctrinal notion of a territory – that Schmitt seeks to recover on the basis of his analysis of *nomos*. Notice that my reading of *The Nomos of the Earth* is selective, as I consider it only as a complement to Schmitt's analysis of concrete order as developed in his essay *On the Three Types of Juristic Thought*.

In the preface to *The Nomos of the Earth* Schmitt reveals the book's aim in no uncertain terms. 'Human thinking again must be directed to the elemental orders of its terrestrial being here and now'.³⁶⁵ The central thesis defended by Schmitt in *The Nomos of the Earth* is that law is spatially rooted. Legal order exists as a spatially emplaced order, that is, as a unity of order (*Ordnung*) and emplacement (*Ortung*). In order to examine the relation between law and space, Schmitt focuses on the 'primeval act in founding law' (*rechtsbegründenden Ur-Aktes*): the act of a *Landnahme*, i.e. an act of land-taking.³⁶⁶ He claims that the taking of land precedes legal order both conceptually and chronologically. 'The taking of land precedes the order that follows from it not only logically but also historically. It constitutes the spatial original order, the origin of all further concrete order and all further law'.³⁶⁷ In order to elaborate the fundamental meaning of the German notion of *Landnahme* Schmitt traces it back to the Greek notion of *nomos*. 'The Greek word for the first measure of all subsequent measures, for the first taking of land understood as the first partition and classification of space, for the primeval division and distribution, is *nomos*'.³⁶⁸ Since I am interested in the notion of *nomos* as a complement to the concept of concrete order, in the following I will take Schmitt's definition of *nomos* as a conceptual thesis about the structure of legal order and will leave aside his historical and etymological substantiation.

³⁶³ Kelsen, *Introduction*, 1992, p. 12.

³⁶⁴ Carl Schmitt, *The Nomos of the Earth in the International Law of Jus Publicum Europaeum*, trans. G.L. Ulmen, Telos Press: New York, 2006 [1950], p. 42.

³⁶⁵ Schmitt, *The Nomos of the Earth*, 2006, p. 39.

³⁶⁶ Schmitt, *The Nomos of the Earth*, 2006, p. 45. I prefer to translate *Landnahme* with 'land-taking' rather than 'land-appropriation' as used in the English translation of *Der Nomos der Erde* since the former is closer to the German notion of *nahme* (*nehmen*, to take) than the latter.

³⁶⁷ Schmitt, *The Nomos of the Earth*, 2006, p. 48, translation altered.

³⁶⁸ Schmitt, *The Nomos of the Earth*, 2006, p. 67.

Let me first discuss the historical or chronological precedence of *nomos* over legal order. The act of land-taking, Schmitt argues, should be understood as a ‘legal-historical fact’ (*rechtsgeschichtliche Tatsache*), and not as an ‘intellectual construct’ (*gedankliche Konstruktion*).³⁶⁹ The act of land-taking is a ‘concrete, historical and political event (*Ereignis*)’³⁷⁰ performed by a land-taking group. ‘The *nomos* by which a tribe, a retinue, or a people becomes settled, i.e. by which it becomes historically situated and turns a part of the earth’s surface into the force-field of a particular order, becomes visible in the appropriation of land and in the founding of a city or a colony’.³⁷¹ In Schmitt’s view, as an act, an event, the taking of land has an originary character. ‘Law and order are . . . one at this origin (*Ursprung*) of land-taking and can here, at this beginning (*Anfang*), where emplacement and order coincide, not be separated’.³⁷²

Next to this historical or chronological precedence, Schmitt claims that *nomos* also precedes legal order conceptually. To this end, Schmitt retraces the meaning of *nomos* to the word *nemein*. ‘The Greek substantive *Nomos* derives from the Greek verb *nemein*. These substantives are *nomina actiones* and designate a doing as an act, which receives its content from the verb’.³⁷³ If *nemein* is commonly taken to mean to divide (*teilen*) and to pasture (*weiden*), Schmitt argues that it contains a third, more fundamental meaning that is generally ignored. Besides dividing and pasturing, *nomos* means first of all ‘taking’, *nehmen*. This means that, as Julia Chrystostalis notes, ‘in Schmitt’s reading of *nomos*’ etymology, land-division, the act that *nomos* names in its very *etymon*, coincides with land-appropriation, the fundamental process that, according to Schmitt, roots law to the land’.³⁷⁴ Consequently, Schmitt defines *nomos* as ‘the initial measure and division of pastureland’.³⁷⁵ The taking of land is the ‘first concrete and constitutive distribution (*Zuteilung*)’.³⁷⁶ ‘All subsequent developments are either results of and expansions on this act or else redistributions (*anadasmus*) – either a continuation on the same basis or a disintegration of and departure from the constitutive act of the spatial order established by land-appropriation, the founding of cities, or colonization’.³⁷⁷ If, in Schmitt’s interpretation, *nomos* means the act that establishes the ‘supreme ownership of the community as a whole’, all subsequent acts reaffirm this first act.³⁷⁸

Reflecting on the spatial nature of *nomos*, Schmitt argues that ‘a land-appropriation grounds law in two directions: internally and externally’.³⁷⁹ Internally, the land-taking group establishes itself as an inside. As Schmitt sees it, a land-appropriation grounds the law internally

³⁶⁹ Schmitt, *The Nomos of the Earth*, 2006, p. 46.

³⁷⁰ Schmitt, *The Nomos of the Earth*, 2006, p. 48.

³⁷¹ Schmitt, *The Nomos of the Earth*, 2006, p. 70.

³⁷² Schmitt, *The Nomos of the Earth*, 2006, p. 81.

³⁷³ Carl Schmitt, ‘Nehmen/Teilen/Weiden. Ein Versuch, die Grundfragen jeder Sozial- und Wirtschaftsordnung von Nomos her richtig zu stellen’, in *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954. Materialien zu einer Verfassungslehre*, Duncker & Humblot: Berlin, 1973 [1953], pp. 489–504, especially p. 490, my translation, MB.

³⁷⁴ Julia Chrystostalis, ‘Reading Arendt ‘Reading’ Schmitt: Reading *Nomos* Otherwise?’, in Maria Drakopoulou (ed.), *Feminist Encounters with Legal Philosophy*, Routledge-Cavendish: London, 2013, pp. 158–184.

³⁷⁵ Schmitt, *The Nomos of the Earth*, 2006, p. 70.

³⁷⁶ Schmitt, *The Nomos of the Earth*, 2006, p. 74.

³⁷⁷ Schmitt, *The Nomos of the Earth*, 2006, p. 78.

³⁷⁸ Schmitt, *The Nomos of the Earth*, 2006, p. 45, italics in original

³⁷⁹ Schmitt, *The Nomos of the Earth*, 2006, p. 45.

in that it creates the 'first order of all ownership and property relations'.³⁸⁰ Externally, the land-taking group constitutes itself as an inside over and against an outside, which means that 'the land-appropriating group is confronted with other land-appropriating groups and powers'.³⁸¹ Consequently, the act of land-taking effectuates a spatial closure that separates an inside from an outside.

Importantly, the spatial closure of a concrete order can be made intelligible only from the 'suprapersonal' perspective of a social group or collective that engages in the act of land-taking. In fact, the spatial concreteness of a concrete order has a two-way correlation with the suprapersonal perspective of a collective. On the one hand, the taking up of the suprapersonal perspective of a collective requires its emplacement as reflected by spatial boundaries. On the other hand, the distinction between inside and outside makes sense only from the suprapersonal perspective of an emplaced collective. Consequently, considered from the suprapersonal perspective of a collective, the distinction between inside and outside implies a *preference* for the inside. The inside marks what Schmitt calls elsewhere the 'place'³⁸² (*Platz*) of a collective.

But this is not all. The spatial closure effectuated by an act of land-taking is defined by Schmitt as an *original* closure between inside and outside. In Schmitt's interpretation, land-taking is an inaugural act that establishes the framework for the subsequent and hence derivative acts of dividing and pasturing. Put differently, the act of land-taking is a constitutive act, an act that constitutes the closure between inside and outside. To the extent that the acts of dividing and pasturing are premised on the act of land-taking, they reaffirm this spatial closure. Crucially, in reaffirming the spatial closure of a collective, the acts of dividing and pasturing in their turn maintain and secure it. In this sense, if the act of land-taking can be defined as an act of boundary constitution, the subsequent acts of dividing and pasturing are acts of boundary enforcement. The acts of dividing and pasturing enforce the spatial closure that is constitutive of the existential unity of a collective as an inside over and against an outside.

In Schmitt's view, the act of boundary constitution precedes acts of boundary enforcement, both chronologically and conceptually. This point is of considerable importance for the concept of security available to Schmitt. Indeed, his account of the spatial closure of collective subjectivity implies an *opposition* between boundary constitution and boundary enforcement. Not only is collective security about preserving existential unity as an inside but also about *enforcing* the boundary between inside and outside. To put it in more general terms, Schmitt can only view security as an issue of boundary enforcement, where what is enforced are the boundaries which constitute a collective as an existential unity. Crucially, the existential unity of a collective, and the boundaries which concretely configure it, is given prior to and independently of acts of boundary enforcement. A collective's insecurity turns on the fact that its boundaries can be breached, not because there is an irreducible groundlessness as to how its boundaries have been drawn, a crucial point to which we shall return later in this thesis.

³⁸⁰ Schmitt, *The Nomos of the Earth*, 2006, p. 45.

³⁸¹ Schmitt, *The Nomos of the Earth*, 2006, p. 45.

³⁸² Schmitt, *Constitutional Theory*, 2008, p. 240 and p. 272.

2.5 An Existential Concept of Security

We are now poised to enter the domain of an existential characterization of security. Before doing so, it may be helpful to look back and quickly summarize the argument developed heretofore. In a first step, this Chapter has outlined the contours of a normativist conception of security. This normativist concept of security involves a twofold reductive movement, or so Schmitt claims. On the one hand, it makes of (in)security a strictly legal category which depends on the distinctions between legality and illegality, and between validity and efficacy. On the other hand, normativism can only predicate (in)security of individuals. To the extent that a state is but a legal order, only individuals can be secure or insecure. Rejecting what he takes to be this twofold reduction, Schmitt points to the concept of public order as the proper point of departure for an existential concept of security. The publicness of public order points, on the one hand, to a political domain, to the state as a concrete order, which is the necessary existential presupposition of the purely normative distinction between the legal and the illegal. And it points, on the other, to a collective subject, to the state as a political unity, which is most fundamentally at stake in security. Individual security is derivative thereof and must cede to the security of the state. Subsequently, I have unpacked Schmitt's proposal to view a state as a concrete order. As will have become clear in the course of the exposition, the notion of concrete order does much more than simply shift the locus of security to the state; it interprets the state in a highly specific way: as institution, as normality, as homogeneity, and as *nomos*. These different aspects of Schmitt's account of the state as the proper locus of security come together in the distinction between the own and the strange, and to which we must now turn.

2.5.1 The Own and The Strange

Famously, Schmitt defines the concept of the political in *The Concept of the Political* as the distinction between friend and enemy. According to Schmitt, 'the friend and enemy concepts are to be understood in their concrete and existential sense'.³⁸³ The enemy constitutes an 'existential negation' (*seinsmäßige Negierung*) of the friend's mode of being.³⁸⁴ War is the ultimate consequence of the antagonistic distinction between friend and enemy. In case of extreme peril, the friend grouping has to destroy the enemy. 'The friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing'.³⁸⁵ On a closer look, Schmitt's distinction between friend and enemy is based on another distinction, to wit the distinction between the own and the strange. Schmitt's fateful move is to equate the enemy to the strange. Defining the friend-grouping as an 'existential partaking and participating' in a particular political substance, Schmitt argues that the enemy appears to the friend-grouping as 'the other, the stranger (*der andere, der Fremde*)'.³⁸⁶ The enemy is in 'a special intense sense existentially something other (*anderes*) and strange (*Fremdes*)'.³⁸⁷

³⁸³ Schmitt, *The Concept of the Political*, 2007, p. 27.

³⁸⁴ Schmitt, *The Concept of the Political*, 2007, p. 33.

³⁸⁵ Schmitt, *The Concept of the Political*, 2007, p. 33.

³⁸⁶ Schmitt, *The Concept of the Political*, 2007, p. 27.

³⁸⁷ Schmitt, *The Concept of the Political*, 2007, p. 27.

The distinction between ownness and strangeness underlying Schmitt's account of the friend and enemy distinction leads back to Hegel's definition of the enemy, to which Schmitt refers in *The Concept of the Political*. In *The Concept of the Political*, Schmitt cites the following passage of Hegel's *System of Ethical Life*:

'What is ethical must itself intuit its vitality in its difference, and it must do so here in such a way that the essence of the life standing over and against it is posited as strange and to be negatived . . . A difference of this sort is the *enemy*, and this difference, posited in its bearing, exists at the same time as its counterpart, the opposite of the being of its antithesis, i.e. as the nullity of the enemy, and this nullity, commensurate on both sides, is the peril of battle. For ethical life this enemy can only be an enemy of the people and itself only a people.'³⁸⁸

Borrowing Hegel's notion of the enemy, Schmitt defines it as 'negating strangeness' (*negierendes Fremdes*).³⁸⁹ That is, the enemy implies a negation of a collective's existential unity. By tracing the friend-enemy distinction back to the distinction between the own and the strange, it becomes clear that the enemy concept represents the most radical form of strangeness. 'In conceptual terms, the enemy is something existentially other (*Anderes*) and strange (*Fremdes*), the most extreme escalation of otherness (*Anders-Seins*), which in the case of conflict leads to the denial of the own type of political existence'.³⁹⁰ I will return to Schmitt's definition of the enemy and critically assess it in Chapter 3, exploiting the difference between the notions of otherness and strangeness. For now it suffices to note that the friend-enemy distinction represents only a certain manifestation of the distinction between ownness and strangeness, namely, its most extreme opposition.

To the extent that concrete order in a normal condition is defined by Schmitt as 'an organized political unity, internally peaceful, territorially enclosed, and impenetrable to strangers (*Fremde*)',³⁹¹ the strange forms a threat to the concrete order as a whole, that is, to the existential unity as such. According to Schmitt, the enemy is an 'existential threat' (*seinsmäßige Verneinung*) to a collective.³⁹² In other words, to the extent that the strange is an 'existential negation' of political unity, it confronts a collective with the possibility of its non-existence.

'For as long as a people exists in the political sphere, this people must, even if only in the most extreme case – and whether this point has been reached has to be decided by it – determine by itself the distinction between friend and enemy. Therein resides

³⁸⁸ G.W.F. Hegel, *System of Ethical Life* (1802/3) and *First Philosophy of Spirit* (Part III) of the System of Speculative Philosophy (1803/4), trans. T.M. Knox, State University of New York Press: Albany, 1979, p. 147, italics in original.

³⁸⁹ Schmitt, *The Concept of the Political*, 2007, p. 63, translation altered.

³⁹⁰ Schmitt, *Constitutional Theory*, 2008, p. 394, translation altered.

³⁹¹ Schmitt, *The Concept of the Political*, 2007, p. 47, translation altered, MB.

³⁹² Schmitt, *The Concept of the Political*, 2007, p. 49.

the essence of its political existence. When it no longer possesses the capacity or the will to make this distinction, *it ceases to exist politically*.³⁹³

Schmitt's thoughts about the enemy are linked to his account of heterogeneity. As the contrasting term of homogeneity, heterogeneity represents the abnormal. As Schmitt puts it in relation to the issue of national homogeneity, 'a nationally homogeneous state appears then as something normal. A state lacking this homogeneity has an abnormal quality that is a threat to peace'.³⁹⁴ In Schmitt's interpretation, to the extent that the heterogeneous breaks the homogeneity of concrete order it embodies the element of strangeness; the heterogeneous is what Schmitt calls a 'strange (*fremden*) component'.³⁹⁵ Consequently, in Schmitt's view, order/disorder, normality/abnormality, homogeneity/heterogeneity, oneness/strangeness and inside/outside are all related contrasts. They provide the existential content of the contrast between security and insecurity, respectively.

2.5.2 Collective Self-Preservation

The distinction between the own and the strange suggests that security is about collective self-preservation, a notion which refers to in passing in some of his writings. For example in his discussion of the exception in *Political Theology*:

'In such a situation [i.e. when a legal order faces an exception, MB] it is clear that the state remains, whereas law recedes . . . The existence of the state is undoubted proof of its superiority over the validity of the legal norm. The state suspends the law in the exception on the basis of the right to self-preservation, as one would say.'³⁹⁶

Moreover, in *Constitutional Theory* Schmitt specifies that he understands the notion of self-preservation in a Spinozist way.

'Every existing political unity has its value and its "right to existence" not in the rightness or usefulness of norms, but rather in its existence. What exists as a *political* magnitude, has, considered juristically, value in that it exists. Consequently, its "right to self-preservation" is a prerequisite of all further discussions; it attempts, above all, to maintain itself in its existence, "in suo *esse* perseverare" (Spinoza); it protects "its *existence*, its *integrity*, and its *constitution*", which are all existential values.'³⁹⁷

Within the context of *Constitutional Theory* this passage can be read in a constitutional way, that is, as a further explication of the state's right to self-preservation as outlined in *Political Theology*. This would amount to interpreting the concept of self-preservation in terms of what Schmitt

³⁹³ Schmitt, *The Concept of the Political*, 2007, p. 49, emphasis added, MB.

³⁹⁴ Schmitt, *Constitutional Theory*, 2008, p. 262.

³⁹⁵ Schmitt, *Constitutional Theory*, 2008, p. 262, translation altered, MB.

³⁹⁶ Schmitt, *Political Theology*, 1985, p. 12.

³⁹⁷ Schmitt, *Constitutional Theory*, 2008, p. 76, italics in original, translation altered.

calls the distinction between constitution (*Verfassung*) and constitutional law (*Verfassungsgesetz*), that is, the distinction between the state and ‘its own constitutional forms’.³⁹⁸ But this is not the line of interpretation that I will pursue here. Indeed, the above cited passage includes a more fundamental understanding of self-preservation that would remain veiled in such a ‘constitutional’ interpretation. In fact, Schmitt’s interpretation of self-preservation invokes the best known proposition of Spinoza’s *Ethics*, expressing the core of his *conatus* doctrine: *unaquaeque res, quantum in se est, in suo esse perseverare conatur*, ‘each thing, as far as it can by its power, strives to preserve in its being’.³⁹⁹ Rather than reading the notion of self-preservation in a constitutional sense as elaborated explicitly in Schmitt’s writings, I will use Schmitt’s Spinozist interpretation of self-preservation to further define the concept of security ontologically.

Characteristic of Spinoza’s *conatus* doctrine is that it assumes that a being that is endowed with an inner striving (*conatus*) to preserve itself qualifies as ‘substance’.⁴⁰⁰ Substance, in the context of Spinoza’s metaphysics, means self-causation. To the extent that self-causation is an internal force, a being lacks an inner factor of decay. Indeed, self-causation means that a being causes its own continuation in existence. To put it in Spinoza’s terminology, as substance, a being is existentially ‘inert’.⁴⁰¹ This does not exclude however the possibility that a being is challenged by external causes. In the confrontation with external causes, the being in question is required to ‘exclude’ the external causes in order to persist in its existence.⁴⁰² Now, it is this experience of external causes that marks the experience of *contingency*. Contingency refers to a being that experiences the vulnerability of its existence, which, in Spinoza’s interpretation, relates to being threatened by external causes.⁴⁰³ Actually, this problem, Hans Blumenberg contends, is the modern problem par excellence, a problem in fact that finds its culmination in Spinoza’s *conatus* doctrine. I will return to Blumenberg’s analysis of contingency as a modern problem in Chapter 3, when elaborating an alternative interpretation of collective self-preservation.⁴⁰⁴ For the moment it suffices to note that Spinoza claims that a being is endowed with an inner striving to self-preservation and hence that contingency is related to the experience of an external cause that threatens a being’s continued existence.

Crucially, Spinoza assumes a particular understanding of contingency, Blumenberg notes. If understood as substance, a being can either be said to be or not be the cause of its continued existence and hence persist or not persist in its existence. In this sense, Spinoza defines contingency as a problem of existence or non-existence. Either a being exists and persists in its existence in that it is the cause of its being, or stops being such and surrenders to

³⁹⁸ Schmitt, *Die Diktatur*, 1921, p. 143, my translation, MB.

³⁹⁹ Benedictus de Spinoza, *Ethics*, trans. Edwin M. Curley, in: E. Curley (ed.), *The Collected Works of Spinoza* (vol. 1), Princeton University Press: Princeton, 1988 [1678], pp. 408–617, especially p. 498.

⁴⁰⁰ For the following analysis of Spinoza’s *conatus* doctrine I draw on Don Garret’s article, ‘Spinoza’s *conatus* argument’, in: Olli Koistinen & John Biro (eds.), *Spinoza: Metaphysical Themes*. Oxford University Press: Oxford, 2002, pp. 127–158.

⁴⁰¹ Garret, ‘Spinoza’s *conatus* argument’, 2002, p. 145.

⁴⁰² Garret, ‘Spinoza’s *conatus* argument’, 2002, p. 146.

⁴⁰³ For a concise but fundamental analysis of the philosophical definition of contingency, see Hans Blumenberg, ‘Kontingenz’, in Kurt Galling (ed.), *Die Religion in Geschichte und Gegenwart. Handwörterbuch für Theologie und Religionswissenschaft*, vol. III, J.C.B. Mohr: Tübingen, 1959, pp. 1793–1794.

⁴⁰⁴ Hans Blumenberg, ‘Self-Preservation and Inertia: On the Constitution of Modern Rationality’, in Darrel E. Christensen et. al. (eds.), *Contemporary German Philosophy*, vol. 2, 1983, pp. 209–256.

external causes. What is problematic about this understanding of contingency is, in Blumenberg's view, that it completely disregards contingency in the sense of the possibility of alteration.⁴⁰⁵ By interpreting self-preservation as the persistence of a being in its actual state, Spinoza seems to overlook the problem of a being's continued existence by transforming its actual state.

Spinoza's reference to the notion of self-preservation provides some important insights with respect to Schmitt's existential concept of security. First of all, the characterization of a collective as a substance, i.e. as a self-caused being. At one point Schmitt refers to the existence of a collective as a homogeneous substance. In order to claim that a concrete order is the ground of a legal order, Schmitt has to assume that concrete order is the ground of its own existence, that it is the cause of its own being. This however requires Schmitt to simply assume the existence of a collective as a unity, i.e. an existential unity; a legal order finds its ground, ultimately, in the existentiality of a collective, which Schmitt defines as substance. As Schmitt submits, 'the special type of political existence need not and cannot legitimate itself'.⁴⁰⁶ Secondly, that which appears in Schmitt's analysis as the strange refers to the metaphysical notion of contingency. The strange represents an existential threat to a collective. Thirdly, to the extent that a collective is endowed with a pre-given, inner striving for self-preservation, the normal condition of concrete order can be defined as a condition of security. As Schmitt puts it, 'the endeavor of a normal state consists above all in assuring total peace within the state and its territory'.⁴⁰⁷ In a normal state a collective subject is not confronted with the contingency of its existence which, in a Spinozist interpretation, concerns the possibility of its non-existence.

Another, fourth insight is that, in a Spinozist reading, contingency only comes into view in the experience of what Spinoza calls 'external causes'. Defined as self-preservation, security means responding to external causes in order to safeguard the actual and pre-given state of concrete order. In this sense, security has the rather conservative meaning of maintaining the original state of a collective subject. Indeed, in order to save a collective subject from falling back into non-existence, it is compelled to enforce the boundary between normal/abnormal, inside/outside, and ownness/strangeness that demarcates its existential unity. Lastly, reducing contingency to the problem of existence/non-existence, self-preservation does not include the possibility of change, that is, the 'self' changing its present state in order to safeguard its continued existence, an aspect that is actually contained in Hauriou's vitalist concept of institution. In Hauriou's view, an institution is a social organism and therefore subject to a continual movement of conservation and transformation. In Schmitt's view, however, an existential threat cannot but be understood as a confrontation with the possibility of non-existence, i.e. a challenge to the fact *that* the collective exists as a unity, and can therefore not be taken as a challenge to *what* it the collective is as a unity, to its 'materiality', as Hauriou puts it.

⁴⁰⁵ Blumenberg, 'Self-Preservation and Inertia', 1983, p. 243.

⁴⁰⁶ Schmitt, *Constitutional Theory*, 2008, p. 136.

⁴⁰⁷ Schmitt, *The Concept of the Political*, 2007, p. 46.

The latter point is absolutely decisive. I noted at the outset that self-preservation speaks to an ontological concept of security because contingent existence is the mode of being of (collective) subjectivity. Now the contingency of existence has two dimensions: *that* a subject exists (rather than doesn't exist) and *what* it is as an existent being (rather than being otherwise). Schmitt's fateful move is to collapse contingency in the sense of that-ness, such that challenges to the collective subject can only be thematized in terms of existence/non-existence, i.e. as a *threat*, not in terms of an *opportunity* for the transformation of the collective to accommodate what challenges its unity. In other words, collective self-preservation, in Schmitt's reading of security, makes no room for collective self-*transformation*. This entails that to secure or preserve the collective against the strange can only mean to *enforce* the boundaries of the collective by neutralizing the strange. This move drastically limits the range of responses available to the collective in dealing with what challenges its existential unity. We will return to this aspect at a later stage showing that the twofold understanding of contingency opens up the possibility to conceive security not only as boundary enforcement but also as boundary (re)constitution.

2.5.3 Strategies of Collective Self-Preservation

On the basis of Schmitt's definition of security as collective self-preservation, the safeguarding of the continued existence of a collective subject means excluding external causes. Security as collective self-preservation is about responding to the strange that threatens the existential unity of a collective. When confronted with its contingency, i.e. the possibility of its non-existence, a collective is compelled to enforce the boundary between the own inside and the strange outside. More particularly, in Schmitt's interpretation, boundary enforcement means 'eliminating and eradicating'⁴⁰⁸, that is, neutralizing the strange. Schmitt distinguishes basically between three strategies to neutralize the strange, namely (1) assimilation, (2) expulsion and (3) destruction.

Schmitt discusses the security strategies of assimilation and expulsion in the context of his analysis of the notion of national homogeneity. To the extent that Schmitt defines these strategies in relation to national homogeneity, he conceives them as solutions to problems related to migration.

'The resulting possible solutions vary, if there is not national homogeneity in real political terms, because a state consists of diverse nations and contains national minorities. Initially, there is the attempt at peaceful engagement and separation or gradual, peaceful *assimilation* to the ruling nation . . . The other method is quicker and more violent. It is the elimination of the strange (*fremden*) component through suppression or *exile* of the heterogeneous population and other radical means.'⁴⁰⁹

⁴⁰⁸ Schmitt, *The Crisis of Parliamentary Democracy*, 1985, p. 9.

⁴⁰⁹ Schmitt, *Constitutional Theory*, 2008, p. 262, italics in original, translation altered, MB.

So, the first strategy to neutralize a security threat is undoing it of its strange character so that it fits within normal order. The second method is to exile the strange. Whereas assimilation implies integrating the strange into the own, expulsion implies the opposite, excluding it.

The third strategy to neutralize existential threats is a radicalized version of expulsion. Schmitt discusses this third strategy in the context of his distinction between friend and enemy as war.

‘The friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing. War follows from enmity because the latter is the existential negation of another being (*eines anderen Seins*)’.⁴¹⁰

This is to say that the third security strategy is to destroy the strange. This is an even more radical way to deal with security threats than expulsion, as it does not simply mean exclusion but the negation of that which negates the existential unity of a collective. The ultimate response to an existential threat is to destroy it.

2.5.4 Sovereignty

The elaboration of Schmitt’s reference to Spinoza’s concept of self-preservation stages his ‘legal’ treatment of security. The legal determination of what Schmitt ontologically defines as the moment in which a collective engages in collective self-preservation is public order. Essential to Schmitt is that the problem of sovereignty comes into view in a situation in which the notion of public order is invoked. Sovereignty, in Schmitt’s interpretation, is a response to the strange, the abnormal. We could say that what Schmitt renders as sovereignty at the level of legal order is what Spinoza defines as *conatus* at the ontological level. Schmitt’s analysis of sovereignty marks the culmination of his polemic with the normativist conception of security in the sense that security in the final analysis demands a sovereign decision about public order, that is, an existential decision about the boundary between the own and the strange, the normal and the abnormal.

Schmitt distinguishes sovereignty from legally founded police authority. According to Schmitt, sovereignty is not really at issue in the case of legally regulated police authority. To the extent that police interventions are bounded by law, these interventions are embedded in normal order. That is, the legal definition of police interventions turns them into regulated and normal interventions. Legal regulation makes police interventions ‘calculable and definable and provides a controllable normal content (*einen kontrollierbaren, normalen Inhalt*) to the concepts “maintenance” of “public security” and “order,” etc., thereby facilitating court supervision’.⁴¹¹ Therefore, in Schmitt’s interpretation, legally regulated police interventions such as the intrusion of fundamental rights that are routinely performed cannot be qualified as exceptional. Consequently, Schmitt’s analysis of the legal foundation of police authority implies that the concept of public order partly has a ‘normal’ content. The problem of sovereignty becomes

⁴¹⁰ Schmitt, *The Concept of the Political*, 2007, p. 33, translation altered.

⁴¹¹ Schmitt, *Constitutional Theory*, 2008, p. 214, translation altered.

visible when ‘the normal presuppositions’⁴¹² of police interventions are not given and first need to be established.

Famously, Schmitt defines sovereignty as the decision on the exception, i.e. an abnormal situation or abnormal behavior that is not codified in the legal order. If Schmitt discusses the enemy as the legal manifestation of the abnormal, he analyses the exception (*Ausnahme*) as its legal manifestation. Schmitt defines the exception as the situation or behavior that is ‘not codified’ in the existing legal order.⁴¹³ This means, in Schmitt’s view, that ‘the exception is that which cannot be subsumed; it defies general codification’.⁴¹⁴ Therefore, the exception ‘can at best be characterized as a case of extreme peril, a danger to the existence of the state or the like; but it cannot be factually circumscribed’.⁴¹⁵ What is crucial about the exception is, in Schmitt’s view, that it ‘defies’ the legal order, that is, it defies the distinction between legality and illegality as drawn by the legal order. This means that the exception intimates a suspension and in that sense challenges the normativity of the distinction between legality and illegality as set by a legal order. In this respect, the exception is a more radical manifestation of abnormality than illegality. Whereas the exception ‘defies’ the validity of the distinction between legality and illegality, illegality affirms it, albeit *ex negativo*. That is, by violating an individual legal norm, illegal behavior also affirms it and by implication the validity of the legal order as a whole. The exception on the other hand calls into question the ground of the legal order, drawing attention to the collective subject underlying legal order. Indeed, to the extent that, in Schmitt’s interpretation, legal order is merely the objective, formal codification of normal order, the exception discloses the underlying concrete order for the sake of which the legal norms have been established and for which legal norms are vehicles for its continuity over time.⁴¹⁶

The sovereign decision is twofold as it both establishes if the situation or behavior is abnormal and what interventions are issued in response. ‘He [i.e. the sovereign, MB] decides whether there is an extreme emergency as well as what must be done to eliminate it’.⁴¹⁷ For Schmitt, this is an important point as it means that the decision on public order implies a gap concerning jurisdictional competence. The ‘precondition’ and ‘content’ of the sovereign’s competence to proclaim public order is necessarily indeterminate.⁴¹⁸ That is, the sovereign is, paradoxically, bound by law not to be bound by law. In this respect, Schmitt submits, the sovereign stands both inside and outside the legal order. ‘Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety’.⁴¹⁹ This is the sense in which Schmitt defines sovereignty as a ‘boundary concept’ (*Grenzbegriff*).⁴²⁰ Actually, to the extent that what

⁴¹² Schmitt, *Constitutional Theory*, 2008, p. 214.

⁴¹³ Schmitt, *Political Theory*, 1985, p. 6.

⁴¹⁴ Schmitt, *Political Theory*, 1985, p. 13.

⁴¹⁵ Schmitt, *Political Theory*, 1985, p. 6.

⁴¹⁶ Hauriou’s discussion with Kelsen is instructive in understanding the relation between institution and legal order. See in this respect Waline’s lucid article on Hauriou (Waline, ‘Maurice Hauriou’, 1970).

⁴¹⁷ Schmitt, *Political Theory*, 1985, p. 7.

⁴¹⁸ Schmitt, *Political Theory*, 1985, p. 7.

⁴¹⁹ Schmitt, *Political Theory*, 1985, p. 7.

⁴²⁰ Schmitt, *Political Theory*, 1985, p. 6, translation altered.

is at stake in public order refers to the existential unity of a collective subject, we could read Schmitt's definition of sovereignty also in a more concrete sense. Indeed, if Schmitt defines the exception as a 'boundary case'⁴²¹ (*Grenzfall*) that threatens the boundaries of a collective's existential unity, then enacting measures in the framework of public order is about regaining the 'own boundary' (*eigene Grenze*).⁴²² The sovereign decision is about the boundary between inside/outside, normal/abnormal and own/strange, more particularly, about regaining the own boundary, enforcing the spatial closure of the collective subject that constitutes it as an inside over and against an outside.

The sovereign decision on public order discloses the political nature of security. In Schmitt's view, the issue of public order illustrates that 'the state is not merely a judicial organization; it is also something other than a merely neutral umpire (*Scheidsrichter*) or arbitrator (*Schlichter*). Its essence lies in the fact that it reaches the *political decision*'.⁴²³ The fact that a threat to public order is an exception and thus cannot simply be qualified as an instance of illegality demonstrates once again that the normativist concept of security is reductive, Schmitt claims. Indeed, an abnormal situation defies rather than affirms the distinction between legality and illegality. This is to say that the situation or behavior that is defined as a threat to public order and hence is defined as abnormal cannot be resolved on the basis of the legal norms enshrined in the legal order. It is here that Schmitt's distinction resurfaces between laws (*Gesetz*) in the proper sense of the word, i.e. norms that have general validity, and measures (*Maßnahme*), whose validity is bound by the concrete situation for which they are issued. According to Schmitt, the intervention that follows from the sovereign decision on the exception has the legal status of a measure, and not a proper law. In so far that a legal order lacks an 'automatic answer' to threats to public order, it is up to the sovereign to make a manual decision and issue a measure.⁴²⁴ Consequently, the abnormal situation or behavior cannot simply be understood as a *Tatbestand*, that is, a legal condition to which a legal consequence (a sanction) is imputed. Rather, in a case of public order it is up to the sovereign to take a measure, which is actually the literal meaning of *Maßnahme*.

In sum, the definition of security as collective self-preservation means that insecurity is the experience of a collective's contingency, which Schmitt interprets in a Spinozist way as a problem of existence/non-existence. The experience of contingency is what Schmitt renders as the experience of the abnormal, the strange and the heterogeneous. Security, on the other hand, relates to the issue of dealing with insecurity. Following from Schmitt's reductive understanding of contingency, he understands security as boundary enforcement, a sovereign decision to regain the own boundary, reaffirming the boundary between the own and the strange, normality and abnormality, the homogeneous and the heterogeneous, inside and outside and friend and enemy. This is, in Schmitt's view, what the legal notion of public order is about: a decision on boundary between the own and the strange.

⁴²¹ Schmitt, *Political Theology*, 1985, p. 6, translation altered.

⁴²² Carl Schmitt, *Theorie des Partisanen. Zwischenbemerkung zum Begriff des Politischen*, Duncker & Humblot: Berlin, 1975 [1962], p. 88, my translation, MB.

⁴²³ Schmitt, *The Concept of the Political*, 2007, p. 176, italics in original.

⁴²⁴ Schmitt, 'The Dictatorship of the Reich president', 2011, p. 320.

Conclusion

In this Chapter I have argued that Schmitt defines security as collective self-preservation. The notion of public order is the legal determination of the moment in which a collective subject engages in an act of collective self-preservation. The linchpin of Schmitt's existential conception of security is the notion of concrete order. I have sought to (re)construct it in such a way that it casts light on the concept of security, a concept which, although fundamental to Schmitt's political and legal philosophy, is not prominent in his writings. First of all, the concept of concrete order allows Schmitt to introduce the idea of collective subjectivity, that is, a collective subject as the ground of legal order. Essential in this respect is the notion of the directing idea. The directing idea allows of conceiving a collective as an acting unity to the extent that its members are engaged in its realization. Furthermore, the notion of concrete order permits Schmitt to define it as normal order, as homogeneity and as a *nomos*. Tracing Schmitt's reference back to Spinoza, I argued that security as collective self-preservation means safeguarding the own inside by neutralizing the strange that comes from without. That is, security is about enforcing the original boundary between the normal and the abnormal, inside and outside, the own and the strange, the homogeneous and the heterogeneous, and friend and enemy.

Let me indicate what I take to be strong features of Schmitt's contribution to a theory of security, carefully disengaging those features from what I take to be the highly problematic and untenable aspects thereof. First and foremost, I endorse Schmitt's claim that security is an ontological concept, i.e. that the focus of a theory of collective security is the contingent existence of a collective subject, hence that contingent existence is the mode of being proper to collective subjectivity. The strength of Schmitt's definition of security as collective self-preservation is that it starts from the suprapersonal perspective of a collective. Only when taking this perspective into account it is possible to provide an alternative to the normativist conception of security, which reduces security and insecurity to the distinction between legality and illegality. While this need not entail jettisoning a strongly normative dimension of security, as Schmitt thought, it does suggest that Kelsen's move to factor out the concept of collective subjectivity from a theory of law and state systematically blocks access to the concept of collective security.

I endorse Schmitt's thesis that political and legal philosophy must account for the security of a collective, i.e. that it is meaningful and important to speak about collective security. I am not prepared, however, to take on board Schmitt's further assumption that individual security has a merely derivative character with respect to collective security. Schmitt conveniently brackets the fact that the concept of self-preservation, as introduced by Hobbes and brought to its metaphysically definitive formulation in Spinoza's *conatus*, has its focus in *individual* subjectivity. I revisit this decisive point in due course.

I also believe that Schmitt is on the right track when arguing that security and insecurity refer to concrete forms of order and disorder. The existential unity of a collective subject can be challenged by forms of abnormality that are not covered by the notion of illegality. In order to deal with (rather than simply neutralize, as Schmitt would have it) this strong form of

abnormality a political decision is required. And it is here that Schmitt's analysis of the exception has its place.

However, Schmitt's concept of security also suffers from a number of weaknesses, which can be related to his reified interpretation of the existential unity of collective subjectivity, an interpretation that stems from a reductive understanding of Hauriou's notion of institution. The problem with Schmitt's interpretation of existential unity is that he turns it into a static unity with a fixed substance. This reification of the existential unity of collective subjectivity has four implications that need to be critically examined and redressed if one wishes to make a plausible case for the existential concept of collective security. The first implication concerns the idea that a collective subject is in a condition of security, a condition that can be threatened and maintained. Notwithstanding the fact that Schmitt argues that a condition of complete security is an 'endeavor', that is, both factual and ideal, he nonetheless assumes normal order to be precisely that, a state of absolute security. The second implication is that the contrasts between normal/abnormal, inside/outside, own/strange, homogenous/heterogeneous and friend/enemy are original and hence clear-cut, at least in principle. Security means enforcing pre-existing boundaries. The third implication is, as illustrated by Schmitt's interpretation of Article 48 of the Weimar Constitution, that the collective has at all times primacy over the individual in matters of security. Schmitt has no qualms about sacrificing the individual and her fundamental rights for the sake of the security of the collective. As we have seen, if Kelsen reduces collective (in)security to individual (in)security, Schmitt engages in the inverse reduction. Fourth and lastly, Schmitt's reified interpretation of institution leads him to understand contingency in a Spinozist sense of the experience of existence/non-existence, indeed an experience that comes from without. Security as collective self-preservation means maintaining the actual state of a collective's existential unity, and thus discards the relation between contingency and transformation.

Chapter 3

Security as Collective Self-Assertion

3.1 Introduction

This Chapter offers a critical reappropriation of the existential concept of security developed in Chapter 2, continuing our search for a critical conception of collective security. In the previous Chapter I have argued that Schmitt defines security as collective self-preservation. In Schmitt's interpretation, security means enforcing the original unity of collective subjectivity. Developing an alternative understanding of existential unity, in this Chapter I will redefine collective security as *collective self-assertion*. Collective self-assertion concerns the capacity of a collective to take account of and deal with challenges to its existence by transforming its unity. Key to my definition of security as collective self-assertion is the reflexive mode of being of a collective, an issue that Schmitt fails to conceptualize in an adequate way. A collective has a reflexive mode of being as a unity not simply a unity because its members are the *same* but also, and more fundamentally, that its members view *themselves* as a unity. This reflexive mode suggests that collective existence is intrinsically temporal and spatial and hence inherently transformable although finitely so. Indeed, to the extent that collective existence has a reflexive structure, it is irreducibly contingent in that it exists as a unity and what it is as a unity. In this sense, a collective fundamentally has an insecure existence as a unity. Crucially, the reflexive mode of being of collective subjectivity is not only the root of its insecure existence but also opens up possibilities to deal with that which challenges its existence and, in the process, to transform itself. To the extent that collective existence is contingent in a twofold sense of its that-ness and its what-ness, the response to challenges can range between boundary enforcement and boundary constitution. Security is about a collective asserting its existence every time anew, both enforcing and reconstituting its unity in response to that which challenges it.

The argument of this Chapter unfolds in five steps. In section 3.2, I will develop the notion of existence pertaining to collective subjectivity, drawing on Paul Ricoeur's definition of identity in terms of the interrelated notions of sameness and selfhood. Next, in section 3.3, deconstructing Schmitt's account of the distinction between the principles of identity and representation, I will analyze representation as the temporal mode of being of the existential unity of collective subjectivity. In section 3.4 I will discuss the two ways in which the existential insecurity of a collective manifests itself at the institutional level. This will also allow me to

demonstrate the internal correlation between individual security and collective security. Subsequently, in section 3.5, I will deal with the legal manifestations of collective insecurity that feed into the notion of public order, which, as we will see, revolves around the problem of anarchy. Having analyzed insecurity as the mode of being of a collective at the ontological, institutional and legal level, in section 3.6 I will discuss the notion of security available to a collective subject, to wit boundary setting. Because I develop my existential definition of security as collective self-assertion in a critical discussion with Schmitt, in section 3.7 I will examine the fundamental continuities and discontinuities between Schmitt's definition of collective security and mine.

3.2 Existential Unity

The aim of this Chapter is to make a transition from a static to a dynamic concept of existential security. The key to this transition is the notion of existential unity. Indeed, as I have argued in Chapter 2, there is an internal connection between the way in which collective subjectivity is conceptualized and the concept of security. In this section, I will argue that the existential unity of collective subjectivity should be read in a reflexive sense, and thus cannot be reduced to the 'sameness' of substantial similarity, as Schmitt claims. In order to develop a reflexive notion of existential unity, I will draw on Paul Ricoeur's distinction between identity as sameness and as selfhood, a distinction which, I claim, is the presupposition of an existential concept of security, that is, a concept of security that takes its cue from the first-person perspective of a collective. The members of a collective cannot simply be conceived as a unity to the extent that they are the *same* but also and primarily to extent that they view *themselves* as a unity. Importantly, the reflexive mode of being of collective subjectivity suggests that it exists as a dynamic process of collective self-*identification*, and not as static self-*identity*, as Schmitt argues.

3.2.1 Collective Sameness and Selfhood

The problem of existential unity concerns what we could call the spatio-temporal unity of a collective subject. Schmitt deals with the aspect of spatial unity at length in *The Nomos of the Earth*. According to Schmitt, an act of land-taking brings about the emplacement (*Ortung*) of a collective, establishing a spatial closure that constitutes a collective as an inside over against an outside. Hence, a collective exists as a spatially bounded unity. Besides its spatiality, a collective also exists as a temporal unity. The problem of temporal unity is a rather neglected element in Schmitt's analysis of collective subjectivity. The reason for this is that, as we will see, Schmitt starts from the assumption that a collective subject exists in the mode of immediate self-presence. Despite Schmitt's neglect of the aspect of temporal unity, we could say that it refers to what he calls the 'commonality of historical life'.⁴²⁵ The temporal commonality intimates that a collective subject exists as a temporal arc spanning past, present and future, that is, as a temporally bounded unity. This is however but a first definition of what it means to speak of the existential unity of a collective subject, and which we will have to develop in more detail.

⁴²⁵ Schmitt, *Constitutional Theory*, 2008, p. 262

Interestingly, the problem of existential unity is also central to Karl Löwith's renowned critique of Schmitt.⁴²⁶ Drawing a comparison between Schmitt's analysis of the political and Heidegger's analytic of *Dasein*, Löwith argues that Schmitt defines existential unity ambiguously both in a substantialist and an occasionalist sense, i.e. as a substantial unity and as a unity whose 'content is merely a product of the accidental *occasio* of the political situation which happens to prevail at the moment'.⁴²⁷ Although I will also draw on the phenomenological tradition to elaborate the notion of existence implied by collective subjectivity, I will adopt a different approach to that of Löwith. For whereas Löwith uses Heidegger's analysis of existence to diagnose Schmitt's understanding of political unity, I will draw on phenomenological theories to further develop Schmitt's notion of existential unity. In this sense, my approach is constructive rather than diagnostic.⁴²⁸

In order to analyze the problem of the existential unity of a collective subject, I will approach it as a question of collective identity. More particularly, I will argue that the existential unity of collective subject presupposes a *reflexive* notion of identity. This is to say that collective existence consists of a mode of being in which two interrelated poles of identity are at stake: sameness and selfhood. In other words, a collective subject exists by way of having to continuously relate to *itself* (selfhood) by determining *what* defines it as a unity (sameness). Self-identity will prove to be pivotal in that it introduces the aspect of a self-relation: the members of a collective view themselves (object) as a subject that acts, as Bert van Roermund puts it. This aspect remains underdeveloped in Schmitt's analysis of collective subjectivity. In fact, as we will see, although the notion of an institution and its directing idea enable us to understand a collective as a self, Schmitt has a reductive understanding of collective identity in that he tends to reify collective existence by viewing it predominantly as sameness, that is, the pole of identity which a collective subject shares with other kinds of being, with *things*, in a general sense of the term.⁴²⁹ In order to develop the reflexive identity of collective subjectivity, I will draw on Paul Ricoeur's analysis of personal identity as discussed in *Oneself as Another*⁴³⁰, and not, or at least not primarily, on Schmitt's account of collective identity. For although Schmitt deals with the notion of collective identity explicitly in *Constitutional Theory*, which he contrasts to representation, this notion of identity is only part of the broader picture of identity, in so far as his treatment of identity in those passages relies on the notion of identity as sameness. I will

⁴²⁶ 'But what is the meaning here [in Schmitt's analysis of the political, MB] of a strange (*fremde*) and own (*eigene*) "way of being", and of "ontological" in general, if indeed political being is not one kind of being among others but instead is the protection of the own being and the complete negation of strange (*fremden*) being as such, i.e. if it is political "existence"?' (Karl Löwith, 'The Occasional Decisionism of Carl Schmitt', in: *Martin Heidegger and European Nihilism*, trans. Gary Steiner, Columbia University Press: New York, 1995 [1935], pp. 137-159, especially p. 147, translation altered, MB. Löwith published this article initially under a pen-name: Hugo Fiala, 'Politischer Dezisionismus', *Revue Internationale de la Theorie du Droit*, vol. 9, 1935, pp. 101-123)

⁴²⁷ Löwith, 'The Occasional Decisionism of Carl Schmitt', 1995, p. 144.

⁴²⁸ In this respect, my approach to Schmitt is akin to Michael Marder's, with the difference that Marder attempts to demonstrate the general kinship between Schmitt and phenomenology. See Michael Marder, *Groundless Existence. The Political Ontology of Carl Schmitt*, Continuum: New York/London, 2010.

⁴²⁹ Interesting in this regard is that Schmitt underpins his definition of identity as 'substantial similarity' or sameness in *Constitutional Theory* with a reference to a book of Edmund Husserl, the founding father of phenomenology (Schmitt, *Constitutional Theory*, 2008, p. 265).

⁴³⁰ Paul Ricoeur, *Oneself as Another*, trans. Kathleen Blamey, The University of Chicago Press: Chicago/London, 1994.

return to Schmitt's contrast between identity and representation in section 3.3, when discussing the temporal mode of being of collective subjectivity.

According to Ricoeur, personal identity consists of two interrelated poles of identity: identity as sameness (*idem*-identity) and as selfhood (*ipse*-identity). Let me start with Ricoeur's definition of *idem*-identity. Ricoeur identifies three components of the notion of *idem*-identity. The first component is numerical identity.⁴³¹ Sameness in the sense of numerical identity suggests that distinct occurrences can be considered the same to the extent that they are occurrences of one and the same thing. If numerical identity denotes sameness in the sense of oneness, plurality is its contrasting term. Secondly, sameness signifies qualitative identity.⁴³² Two things can be considered the same, and in that sense are identical, to the extent that they have the same quality in common. The contrasting term of qualitative identity is difference. The third component of identity as sameness concerns its form of permanence in time. To the extent that something can be identified as the same through time, it exists in the mode of an 'uninterrupted continuity'.⁴³³ The contrasting term of uninterrupted continuity is change.

So far Ricoeur's definition of identity as sameness. Although *idem*-identity is the dominant conception of identity, Ricoeur argues that personal identity cannot be reduced to sameness. In fact, he claims that identity as sameness stands in contrast to identity as selfhood. *Iipse*-identity signifies identity in terms of reflexivity, that is to say, a relation to self. Selfhood is at stake in the capacity of a person to view her or himself (hence as an object) as the subject which acts, intends, believes etc. This 'reflexive' relation is an identity relation to the extent that object and subject are the same, identical.⁴³⁴ The contrasting term of selfhood is otherness. The self stands in contradistinction to what is other than self, i.e. the other, whether things or other selves. The last element of identity as selfhood is that it has a different mode of permanence in time than identity as sameness. If the temporal mode of being of sameness is uninterrupted continuity, Ricoeur defines the temporal permanence of selfhood as 'self-constancy' (*maintien de soi*).⁴³⁵ 'Self-constancy is for each person that manner of conducting himself or herself so that others can *count on* that person. Because someone is counting on me, I am *accountable for* my actions before another'.⁴³⁶ Self-constancy is reflexive in that it refers to the capacity of a person to view itself as a unity through time, and to act accordingly. Importantly, it is with respect to the question of temporal permanence that the contrast between sameness and selfhood becomes acute. I will return to this in a minute when discussing character and promise as two models of temporal permanence.

Let me first clarify the significance of the distinction between the interrelated poles of *idem*- and *ipse*-identity. To be sure, the above is but a brief overview of Ricoeur's analysis of the structure of identity and its contrasting terms. Nevertheless, the distinction between identity as sameness and as selfhood demonstrates a crucial difference between the mode of being

⁴³¹ Ricoeur, *Oneself as Another*, 1994, p. 116.

⁴³² Ricoeur, *Oneself as Another*, 1994, p. 116.

⁴³³ Ricoeur, *Oneself as Another*, 1994, p. 117.

⁴³⁴ Ricoeur, *Oneself as Another*, 1994, p. 18.

⁴³⁵ Ricoeur, *Oneself as Another*, 1994, p. 123.

⁴³⁶ Ricoeur, *Oneself as Another*, 1994, p. 165.

of a thing or an object and that of a person or subject, that is, between thing-hood and person-hood. In this regard, Ricoeur builds on Martin Heidegger's insight on the distinct ontological status of things and subjects. To put it in Heidegger's terminology, whereas a thing factually *is*, a subject on the other hand 'factically' *exists*.⁴³⁷ In other words, the distinction between the poles of identity as sameness and as selfhood accounts for an essential difference between thing-identity and personal-identity. Indeed, whereas persons share *idem*-identity with things, the sense of ownership involved in both cases is different: whereas things have their 'own' properties or qualities, there is no reflexive relationship involved here, as in the case of persons. The sense of ownership involved in the case of personal identity involves a reflexive relation such that a person can take up a (critical) stance with respect to features as being its own—or not. Personal identity is reflexive in that it denotes the capacity of a subject to refer to herself or himself by using first-person indexicals such as 'I', 'me', and 'mine' and therefore implies a certain distance and detachment with respect to oneself. This entails that the question 'Who am I?' is irreducible to the question 'What am I?'

Notice that whereas Ricoeur speaks of personal identity, I wish to draw on his analysis of identity to gain insight into collective identity.⁴³⁸ In fact, focusing on the question of personal identity, Ricoeur refers in *Oneself as Another* only in passing to the problem of collective identity.⁴³⁹ Nevertheless, Ricoeur's analysis can be applied to the notion of collective subjectivity, which I have developed hitherto solely on the basis of Schmitt's political and legal philosophy, to the extent that collective subjectivity also implies a first-person perspective, albeit in the plural. Indeed, to the extent that the concept of concrete order builds on Hauriou's notion of institution, Schmitt can be construed as defining collective subjectivity from the perspective of a collective as an acting unity. Similar to the individual subject in Ricoeur's analysis of personal identity, from a first-person perspective a manifold of individuals can be considered to exist as a collective to the extent that they view themselves (hence as an object) qua acting unity (hence as a subject).⁴⁴⁰ The reflexivity entailed by collective selfhood implies

⁴³⁷ Martin Heidegger introduces the notions of factuality (*Tatsächlichkeit*) and facticity (*Faktizität*) in *Sein und Zeit* to distinguish between the mode of being of, respectively, things and subjects (or, more accurately, *Dasein*) (Martin Heidegger, *Being and Time. A Translation of Sein und Zeit*, trans. Joan Stambaugh, State University of New York Press: Albany, 1996 [1927]). For a Heideggerian analysis of collective selfhood and the crucial distinction between 'that' and 'what' a collective is, a distinction which she correctly argues has been absent from both Waldenfels' and Lindahl's discussions of the strange, see Nanda Oudejans, *Asylum. A Philosophical Inquiry into the International Protection of Refugees*, BOXPress BV: Oisterwijk, 2011 (dissertation). Although there is a strong affinity between Oudejans' analysis of collective selfhood and mine, not least because we draw our inspiration to a considerable degree from the same body of literature, I will take it into another direction. Whereas Oudejans analyzes the problem of collective selfhood in the context of asylum, I will develop it in terms of the problem of collective security. As we will see, this will allow me to formulate a critique of Oudejans' analysis of existential insecurity.

⁴³⁸ My analysis of collective identity is indebted to Bert van Roermund and Hans Lindahl. See in particular Bert van Roermund, 'First-Person Plural Legislature: Political Reflexivity and Representation', *Philosophical Explorations*, vol. 6, no. 3, 2003, pp. 235–252; 'The Law and 'We'', *Ethical Perspectives: Journal of the European Ethics Network*, vol. 13, no. 3, 2006, pp. 525–553; *Legal Thought and Philosophy. What Legal Scholarship is About*, Edward Elgar: Cheltenham/Northampton, 2013; Hans Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood', in: Martin Loughlin and Neil Walker (eds.), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*, Oxford University Press: Oxford, 2007, pp. 9–24; *Fault Lines of Globalization. Legal Order and the Politics of A-Legality*, Oxford University Press: Oxford, 2013.

⁴³⁹ See Ricoeur, *Oneself as Another*, 1994, p. 121 and p. 123.

⁴⁴⁰ Van Roermund, 'First-Person Plural Legislature: Political Reflexivity and Representation', 2003, p. 239.

that collective existence is irreducible to but at the same time not independent from the individuals who constitute it. To the extent that Schmitt invokes the notion of an institution and its directing idea, his account of collective subjectivity involves a reflexive form of ownership with respect to its distinctive features, even if only implicitly, such that a collective subject can take up a relation to them, either by affirming them as its own or by disowning them. In turn, the avowal and disavowal of ownership is related to how the collective subject interprets its directing idea, about which Hauriou notes that it cannot be reduced to a function or an end which is fixed in advance.

3.2.2 Temporal Permanence: Character and Promise

Now, let me turn to the polarity between identity as sameness and as selfhood as manifest in their respective modes of temporal permanence. According to Ricoeur, the model of temporal permanence emblematic for identity as sameness is character.⁴⁴¹ Character refers to temporal permanence as uninterrupted continuity. Ricoeur defines character as a set of acquired dispositions by which a subject, individual or plural, can be recognized as that subject. As such, character can be parsed into two notions: habits and acquired identifications. Peculiar to the model of character is the strong overlap between *idem*- and *ipse*-identity. To the extent that the poles of *idem*- and *ipse*-identity tend to coincide, the stability or temporal permanence of a subject's identity relies on those features that define it as the same through time.

The way in which Ricoeur defines character allows me to draw a parallel with Schmitt's notion of normal order.⁴⁴² To recall, Schmitt defines normal order along two lines, to wit the normal situation and the normal type of man. The normal situation denotes joint action in the sense of patterns of behavioral regularities. This concerns what Ricoeur would call habits. The normal type of man, on the other hand, denotes the political substance of a collective, something that Ricoeur captures with the notion of acquired identifications. So, what Ricoeur defines as character, habit and identification is defined by Schmitt as, respectively, normal order, the normal situation and the normal type of man. Ricoeur's analysis of character enables us to critically reassess Schmitt's account of normal order in that *normal order is the outcome of a reflexive self-relation*. In this sense, normal order should be understood as a process of *normalization*. Importantly, to the extent that normal order represents a stabilized condition of collective existence, the members of a collective experience their unity as relatively unproblematic. It is for this reason that Schmitt speaks of existential unity in the sense of the immediate self-identity of a collective subject in *Constitutional Theory*. Immediate self-

⁴⁴¹ Ricoeur, *Oneself as Another*, 1994, p. 119 ff.

⁴⁴² Although Ricoeur does not speak himself of character in terms of normality, the following passage underscores that this is actually what character is all about: 'In this way, preferences, evaluations, and estimations are stabilized in such a way that the person is recognized in these dispositions, which may be called evaluative. This is why behavior that does not correspond to dispositions of this sort makes us say that it is not in the character of the individual in question, that this person is not herself or even that the person is acting completely out of character' (Ricoeur, *Oneself as Another*, 1994, p. 122). In fact, Ricoeur indicates the risk of a one-sided interpretation of collective identity as sameness, namely, that such an interpretation makes collective identity vulnerable to 'exploitation by the most harmful ideologies of "national identity"' (Ricoeur, *Oneself as Another*, 1994, p. 123).

identity, on his account, means that the questions as to *what* a collective subject is and *that* it exists are deemed unproblematic, and in this sense, ‘secure’.

The second model of permanence in time outlined by Ricoeur is that of making a promise.⁴⁴³ According to Ricoeur, whereas character is emblematic for *idem*-identity, a promise is the privileged manifestation of *ipse*-identity. A promise differs from the temporal permanence of uninterrupted continuity that a subject shares with things in that it implies self-constancy. In Ricoeur’s view, a promise entails a notion of identity that stands as ‘a challenge to time’.⁴⁴⁴ Self-constancy implies a certain determination on the side of the subject, a determination to keep its promise: ‘even if my desire were to change, even if I were to change my opinion or my inclination, “I will hold firm”’.⁴⁴⁵ Importantly, whereas in the case of character, *idem*- and *ipse*-identity tend to overlap almost completely, the model of a promise reveals a gap between the two respective poles of identity. In the case of a promise, Ricoeur notes, ‘the *ipse* poses the question of identity without the aid and support of the *idem*’.⁴⁴⁶ That is, the temporal permanence of a promise is relatively independent from the temporal permanence of character.

While Ricoeur develops the notion of keeping a promise in the context of personal identity there is a revealing passage in *The Human Condition* where Hannah Arendt elaborates the notion of a promise in the context of politics, i.e. the occasion when a manifold of individuals ‘gather together and “act in concert”’.⁴⁴⁷ According to Arendt, it is the force of mutual promise that binds the manifold of individuals together when they do not manifest themselves as an acting unity in an immediate sense. The mutual promise allows the manifold of individuals to understand themselves as a unity through time, and precisely when unity is called into question. Arendt is keen to emphasize the boundedness of a mutual promise. According to her, the mutual promise of a manifold of individuals establishes ‘a certain limited reality’ in that it evokes ‘an agreed purpose for which the promises are valid and binding’.⁴⁴⁸ This political notion of promise allows for further specifying the normative foundation of an institution. For what the notion of a promise indicates is that the commitment to realize the directing idea is premised on reciprocity. Reciprocity means that individuals engage in the ‘joint activity’ of realizing the directing idea of an institution in so far that they acknowledge ‘the rules which define it and which determine their respective shares in its benefits and burdens’.⁴⁴⁹ That is to say, reciprocity is the normative principle of individuals to ‘act in concert’, as Arendt puts it; it explains the self-binding of a manifold of individuals to ‘an agreed purpose’. Reciprocity

⁴⁴³ Ricoeur, *Oneself as Another*, 1994, p. 118.

⁴⁴⁴ Ricoeur, *Oneself as Another*, 1994, p. 124.

⁴⁴⁵ Ricoeur, *Oneself as Another*, 1994, p. 124.

⁴⁴⁶ Ricoeur, *Oneself as Another*, 1994, p. 124.

⁴⁴⁷ Hannah Arendt, *The Human Condition*, The University of Chicago Press: Chicago, 1958, p. 244.

⁴⁴⁸ Arendt, *The Human Condition*, 1958, p. 245.

⁴⁴⁹ This definition of reciprocity derives from Rawls. See John Rawls, ‘Justice as Reciprocity’, *Collected Papers*, Harvard University Press: Cambridge, 1999 [1971], pp. 190–224, especially p. 208. This article formed the background text of the Summer School ‘Reciprocity and the normative foundation of legal order’ organized by Hans Lindahl and Bart van Klink at the behest of the section of Ethics and Practical Philosophy of the Dutch Research School of Philosophy (OZSW) in August 2013 in which I have participated. The lectures by key-note speakers during the Summer School have been published in a special issue of *Netherlands Journal of Legal Philosophy*, vol. 43, no. 2, 2014.

grounds the mutual expectations of a group and is the cause of disappointment if these expectations are not met.

If the model of character represents the temporal unity of a collective subject as an uninterrupted continuity, the model of a mutual promise suggests a different understanding of the temporal unity of a collective subject. To the extent that the reflexive self-relation implies a certain distance to oneself, a promise enables the members of a collective to view *themselves* as a unity across time in the sense of a group the members of which are committed to realizing the directing idea. That is, a collective self-constancy in the sense of a mutual promise between the members of a collective to persevere in realizing the directing idea through time, regardless of the vicissitudes that they may encounter along the way, and even if, in dealing with these vicissitudes, they need to critically reconsider the directing idea that orients their action as a collective. As a consequence, the reflexive self-relation implies a certain flexibility of a collective's temporal unity in the sense that this temporal unity—their history—can be the subject of reconsideration. Importantly, the model of a mutual promise discloses that the temporal unity of a collective subject is not a matter of an immediately self-present identity, but implies a recursive process of *identification* or *self-relating*. The process of collective self-identification implies the irreducible openness of both the questions concerning *who* view themselves as the members of the collective and *what* it is that binds them together.

Essential to the process of self-identification or self-relating is, as mentioned, the directing idea or what Arendt calls the 'agreed purpose' of a collective. For the directing idea enables the members of a collective to view themselves, on the one hand, as a continuous temporal unity and, on the other, as the unity whose continuity is at stake. That is, the actions by the members of a collective can be viewed as joint action to the extent that they are directed towards realizing the directing idea, and thus meet the mutual expectations of the individual members. This is decisive for the problem of security because it shows that *collective* security cannot be detached from *individual* security, beginning with the security of those who participate in the collective. In this sense, the directing idea is the normative point of joint action, i.e. that which joint action is about. It is the criterion to determine if an action is in place or misplaced, timely or untimely. In the case of normal order, the normativity of the directing idea is experienced as rather unproblematic and straightforward. The unproblematic nature of collective existence can no longer be taken for granted when normal order is interrupted. This interruption can take the shape of an misplaced or an untimely behavior, challenging what the collective is as a unity and that it is a unity, thereby illuminating the collective as an ordered whole, as a spatio-temporal *unity*. Behavior that interrupts normal order is qualified as abnormal. I will turn to discuss the issue of abnormal behavior in section 3.4.

3.2.3 Collective Self-Identification

The question that follows from Ricoeur's analysis of identity is of course in what sense a reflexively structured collective subject can be considered to *exist*? Considering that the mode of being of a collective subject is irreducible to the mode of being of a thing, i.e. identity as sameness, what is the mode of being of collective selfhood? What does it mean to speak of

existence qua mode of being of a collective subject as a *self*? Central to the mode of being of collective selfhood is, as noted above, the directing idea. According to Hauriou, the directing idea should not be confused with the notion of an end or a function in that it is not fixed in advance and thus contains ‘an undetermined and unrealized part’.⁴⁵⁰ This means that a collective does not simply exist as a fully realized being. Rather, to the extent that the directing idea contains an undetermined part, a collective exists as *possibility*. As Jean-Luc Nancy formulates it eloquently, the mode of being of selfhood signifies ‘a relation to the “self” wherein the “self” is the “possible”’.⁴⁵¹ In fact, to the extent that taking up a stance to the directing idea is the core of a collective self-relation, we could say that the directing idea ‘possibilizes’ collective existence.⁴⁵² To the extent that Schmitt draws his notion of concrete order from Hauriou’s notion of an institution, the notion of selfhood is not completely absent in his analysis of collective identity.⁴⁵³ Instead, the problem seems to be that Schmitt fails to adequately conceptualize and hence differentiate between identity as selfhood and as sameness.

This definition of the mode of existence of collective selfhood allows for specifying the process of collective self-identification. In the ongoing process of collective self-identification or self-relation, a collective engages in a process of identifying which possible spatio-temporal unities it can view as its own and, by implication, which not. In this sense, we could say that the recursive process of collective self-identification amounts to a decision by the collective on its existence as possibility.⁴⁵⁴ This is to say that the ‘reality’ of a collective subject is that of ‘a functional actualization’ of its status as possibility, to borrow a felicitous formulation of Rudolf Smend, a contemporary and critic of Schmitt.⁴⁵⁵ The process of collective self-identification amounts to the actualization of a possible unity by those who view themselves as a collective, thereby establishing, for the time being, what it is that binds them. As a consequence, what a collective calls its own is the outcome of a process of self-identification in the sense of the actualization of its existence as possibility. This, in contrast to Schmitt, yields a notion of ownness that is irreducible to the reified sense of ownership proper to things.

Now, in so far that the spatio-temporal unity a collective deems to be its own is necessarily a limited actualization of its existence as possibility, it assumes a closure, even if provisional, demarcating self from other than self, more particularly, a *self-closure*. This closure is both spatial and temporal. As to the spatial closure, we could say that a collective subject

⁴⁵⁰ Hauriou, ‘The Theory of the Institution’, 1970, p. 102.

⁴⁵¹ Jean-Luc Nancy, ‘The decision of existence’, in *The Birth to Presence*, trans. Brian Holmes, Stanford University Press: Stanford, 1993, pp. 82-109, especially p. 86.

⁴⁵² Nancy, ‘The decision of existence’, 1993, p. 85.

⁴⁵³ See in this regard for example Schmitt’s analysis of popular assembly: ‘When indeed only the people are actually assembled for whatever purpose, to the extent that it does not only appear as an organized interest group, for example, during street demonstrations and public festivals, in theaters, on the running track, or in the stadium, this people engaged in acclamation is present, and it is, at least potentially, a political entity. Often enough, experience has confirmed that every popular assembly, even one that initially appears nonpolitical, intrinsically contains unexpected political possibilities’ (Schmitt, *Constitutional Theory*, 2008, p. 272).

⁴⁵⁴ An important point, to which I will return in a minute, is that, as Nancy notes in his essay ‘The decision of existence’, the decision by the subject as to *what* it is as a being is preceded by an ‘originary undecidability’ *that* it exists (Nancy, ‘The decision of existence’, p. 96).

⁴⁵⁵ Rudolf Smend, *Verfassung und Verfassungsrecht*, in *Staatsrechtliche Abhandlungen und andere Aufsätze*, 1968 [1928], pp. 119-276, especially p. 136, my translation, MB.

not merely 'has' a place, the way a stone has a place, but rather *emplaces* itself, that is, occupies a place as its *own*. Indeed, the members of a collective in whose name the spatial closure is effectuated view this spatial unity as their own place, i.e. the place where they belong. As to the feature of temporality, the mutual promise between the members of a collective has the power to 'stabilize' time by means of effectuating a temporal closure.⁴⁵⁶ The temporal closure is constitutive of a collective subject's temporal unity in that it enables a collective subject to view itself as a temporal arc spanning past, present and future, retrojecting itself into the past and projecting itself into the future; in a word, to speak of a history (qua temporal unity) as its own collective history. So, the actualization of a collective subject's existence as possibility concerns the spatial and temporal closure that allows the members of a collective to view a spatio-temporal unity as their own. On the one hand, every stance by the collective about what constitutes it as a spatio-temporal unity is an actualization of its existence as possibility. Conversely, to speak of collective existence as possibility is to argue that a collective exists in the mode of a variable range of spatio-temporal unities that it can call its own. Notice though that although I deal here with the problem of spatial and temporal unity separately for the sake of analytical clarity, they are of course intrinsically related: a collective constitutes itself as a spatial unity across time and as an emplaced temporal unity.

An important implication of the mode of being of the collective as a self is that the closure establishes a 'preferential distinction' between self and other than self.⁴⁵⁷ For what is preferred is the collective self that is constituted by the closure, and not that from which the collective distinguishes itself, i.e. that which is other than self. Schmitt's account of spatial closure is a case in point. Schmitt emphasizes the exclusionary function of the closure, that is, 'to separate a pacified order from a quarrelsome disorder, a cosmos from chaos, a house from a non-house, an enclosure from the wilderness'.⁴⁵⁸ In other words, the spatial closure establishes an *asymmetry* between inside and outside, between self and other than self.⁴⁵⁹ In fact, the strong point of Schmitt's analysis of *nomos*, despite its problematic features, is the reestablishment of the link between collective self-identification and collective self-emplacement. The members of a collective view themselves as a unity to the extent that they identify the place that they occupy as their own, that is, by viewing themselves as an *emplaced* unity. And conversely, they can only identify themselves as a collective to the extent that they can identify a place as their own. The same holds for the temporal closure of a collective self. The mutual promise between the members of the collective manifests itself as the principle of self-constancy to the extent that it has the power to unify the plurality of individual acts into a collective history, distinguishing from that which is beyond.

The definition of collective as a self has a second implication. To the extent that the spatio-temporal unity of a collective forms the actualization of its existence as possibility, a

⁴⁵⁶ Hans Lindahl, 'Breaking Promises to Keep Them. Immigration and the Boundaries of Distributive Justice', in Hans Lindahl (ed.) *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice*, Hart Publishers: Oxford, 2009, pp. 137-159, especially p. 157.

⁴⁵⁷ Bernhard Waldenfels, *Vielstimmigkeit der Rede. Studien zur Phänomenologie des Fremden 4*, Suhrkamp: Frankfurt am Main, 1999, p. 197.

⁴⁵⁸ Schmitt, *The Nomos of the Earth*, 2006, p. 52.

⁴⁵⁹ Waldenfels, *Vielstimmigkeit der Rede*, 1999, p. 191.

collective is in a certain sense always ‘more’ than its reality, i.e. its actual spatio-temporal unity. Put differently, the actual spatio-temporal unity of a collective is but one possible actualization of this unity. Moreover, the fact that a collective exists in each case as ‘more is possible than actual’ suggests that this ‘more’ accompanies the collective as its shadow.⁴⁶⁰ I will develop this insight as regards the excess of the possible over the actual existence of a collective in more detail in section 3.3, focusing on the problem of contingency. Let me note here that the mode of being of selfhood suggests that a collective exists as a *transformable* spatio-temporal unity. It is in this sense that Waldenfels would understand the existence of a collective as spatio-temporal unity to be ‘radically contingent’.⁴⁶¹ However, as we will see, the contingency of collective existence as a spatio-temporal unity does not only concern the question as to *what* a collective is as a spatio-temporal unity but also *that* it exists as such a unity.⁴⁶² This distinction between the what-ness and the that-ness of the existence of a collective subject intimates that the notion of radical contingency hinted at by Waldenfels needs to be reconsidered, as collective selfhood does not merely imply the possibility of being otherwise but also the possibility of non-existence, possibilities which are both part and parcel of the collective’s relation to self, that is, possibilities with respect to which a collective must take a stance and in fact always already has taken up a stance, even if only to turn away from them.

A third implication of Ricoeur’s analysis of *ipse*-identity is that the closure constitutive of the spatio-temporal unity of a collective is not exhausted by the pole of *idem*-identity and its contrasts. This is to say that the closure does not simply imply a delimitation of a collective in the sense of numerical identity and qualitative identity in contrast to, respectively, plurality and difference. For such an understanding of the closure of a collective’s spatio-temporal unity would amount to a reductive understanding of its identity, disregarding its mode of being as a self. Instead, the closure constituting the spatio-temporal unity of a collective brings into play selfhood and its contrasting term, otherness. Indeed, the closure effectuates the establishment of a collective as a sphere of ownness delineating it from what is other than self. This suggests that the closure constitutive of the spatio-temporal unity of a collective is not a *unilateral* achievement as Schmitt portrays it, i.e. a decision on the ‘own’ form of existence that a collective reaches for itself and by itself. To the extent that the spatial and temporal closure of a collective subject amounts to a *self*-closure, that from which a collective subject secludes itself, i.e. what is other than self, is implicated in that which is achieved by the closure, namely, the sphere of ownness. In other words, the closure of collective subject shows that it has to reckon with that from which it separates itself, from what is other than self. It is in this context that Waldenfels speaks of the ‘paradox of self-relatedness’: the relation to what is other than self is implicated in a self-relation.⁴⁶³ The paradox of self-relatedness intimates that a self is irreducibly other.

Ricoeur’s notion of otherness is however reductive. Indeed, as Bernhard Waldenfels points out, while Ricoeur develops the notion of otherness as the contrasting term of selfhood

⁴⁶⁰ Waldenfels, *Vielstimmigkeit der Rede*, 1999, p. 175.

⁴⁶¹ Waldenfels, *Vielstimmigkeit der Rede*, 1999, p. 174.

⁴⁶² See Oudejans, *Asylum*, 2011, especially pp. 123–172.

⁴⁶³ Waldenfels, *Vielstimmigkeit der Rede*, 1999, p. 198.

in *Soi-même comme un autre*, he only rarely refers to strangeness.⁴⁶⁴ Waldenfels argues that while Ricoeur parses the notion of identity into sameness and selfhood he does not do so with respect to the notion of alterity. Complementing Ricoeur's analysis of selfhood, Waldenfels defines the strange not simply as other than self but as the 'extra-ordinary' (*außer-ordentlich*). By defining the strange as the extra-ordinary Waldenfels emphasizes both its spatial and excessive character. Excessive, in that the strange represents possibilities that surpass the possibilities available to a self and thus point to a mode of being irreducible to that of the former.⁴⁶⁵ And spatial, in that the strange refers to that which is elsewhere, i.e. a non-place in relation to the self's own place.⁴⁶⁶ In other words, the strange is that mode of the other which calls the self into question, which challenges its existence. The difference between otherness and strangeness suggests that the paradox of self-relatedness should be extended to include strangeness as the radical manifestation of otherness. That is, a self-relation does not merely implicate otherness but also strangeness. This means that the self is not simply irreducibly other but also irreducibly strange. I will return to this insight when discussing the notion of enmity. For whereas Ricoeur disregards otherness as strangeness, Schmitt tends to collapse otherness into strangeness.

Thus far our initial exploration of what it means to speak of a collective subject as an *existential* unity. To summarize, a collective exists in the interrelated modes of sameness and selfhood. A collective exists as the same to the extent that its members and others can view the collective as having more or less the same 'character' over time. And a collective exists as a self to the extent that its members have the capacity to, and effectively do, view *themselves* as the same collective over time. Crucially, the reflexive mode of being of a collective implies that it does not simply exist as an identity but as a recursive process of *identification*. This process-like character of collective existence implies that it can call something its *own* in a sense reserved to the mode of being of personhood. That is, the spatio-temporal unity of a collective subject is not a static unity as in the case of thing-hood, but needs to be understood in terms of possibilities: the actual spatio-temporal unity is a realization of a collective subject's existence as possibility. The insight that a collective subject does not have an identity but exists as a process of identification has also an important implication with respect to the notion of *existential unity*. For to the extent that a collective exists as process of identification it does not exist as a unity in a static sense but as a process of *unification*. Moreover, since the process of identification implicates the contrasting terms of identity as sameness and as selfhood, the process of existential unification is accompanied by a process of *fragmentation* or *disintegration*. The challenge confronting a collective, and which makes its existence a risky endeavor, is that its spatio-temporal unity is constantly exposed to fragmentation. Unification and disintegration of collective existence are the two sides of the same coin.

The reflexive understanding of collective identity suggests that *security cannot be thought in terms of a static condition to be achieved or maintained*. This is the way in which Schmitt defines

⁴⁶⁴ Bernhard Waldenfels, 'The other and the foreign', *Philosophy and Social Criticism*, vol. 21, no. 5/6, 1995, pp. 111-124.

⁴⁶⁵ Bernhard Waldenfels, *Topographie des Fremden. Studien zur Phänomenologie des Fremden 1*, Suhrkamp: Frankfurt am Main, 1997, p. 37 and *Vielstimmigkeit der Rede*, 1999, p. 114 and p. 181.

⁴⁶⁶ Waldenfels, *Topographie des Fremden*, 1997, p. 26 and *Vielstimmigkeit der Rede*, 1999, p. 111

collective self-preservation. Reducing the mode of being of a collective subject to a reified notion of identity, security, in Schmitt's interpretation, amounts to the preservation of a collective subject as an original unity. The insight following from the foregoing analysis is that we need a change in perspective from security as a condition to security as a *process* in which unification and fragmentation are at play. In constituting itself as a unity, a collective is in a continuous negotiation with what is other than self. This idea of a continuous negotiation entails that a collective does not only anticipate the possibility of being otherwise (contingency as what-ness) but also the possibility of non-existence (contingency as that-ness).

3.3 Representation

In the previous section I have defined the notion of existence pertaining to a collective subject on the basis of the interrelated notions of sameness and selfhood. The reflexive mode of being of collective subjectivity implies that it is engaged in an ongoing process of actualizing its existence as possibility. Yet, this analysis is still somewhat abstract and static in that it does not deal with the question how the process of collective self-identification concretely takes shape through time. In what sense does a collective subject exist as the same and as a self through time? The answer to this question is representation; a collective exists through time as representation. That is, representation is a *possible* actualization of collective existence. Interestingly, although all ingredients are present in Schmitt's analysis of collective subjectivity, he does not come to the same conclusion. The reason for this is that, as we will see, assuming a reified understanding of collective identity by interpreting it in terms of sameness, Schmitt posits the collective as an original unity, hence making representation a derivative concept. In Schmitt's interpretation, representation basically means *re*-presentation or substitution. The representational structure of collective subjectivity marks a decisive step with respect to our reinterpretation of the existential concept of security. For the representational structure of collective subjectivity implies that it lacks an original on which it can rely and therefore has an irredeemably insecure existence both as concerns that it is a unity and what it is as a unity.

3.3.1 Collective Self-Reidentification

If I focused in section 3.2 on the issue of collective self-identification, in this section I will be concerned with collective self-identification through time, that is, collective self-reidentification. In order to elaborate the temporal and spatial structure of collective self-reidentification, I will examine the emergence of a collective subject, something that is conceptualized in legal doctrine as the problem of constituent power.⁴⁶⁷ More particularly, in order to elaborate the structure of collective self-reidentification, I will draw on Schmitt's analysis of the principles of political form as developed in *Constitutional Theory*.⁴⁶⁸ Schmitt distinguishes between what he

⁴⁶⁷ For a recent analysis of the concept of constituent power that critically engages with Schmitt's thought, see Martin Loughlin, 'The concept of constituent power', *European Journal of Political Theory*, 2013, pp. 1-20.

⁴⁶⁸ Schmitt, *Constitutional Theory*, 2008, pp. 235-252. For a critical analysis of Schmitt's discussion of political forms in *Constitutional Theory*, see Voegelin, 'Die Verfassungslehre von Carl Schmitt', 1931, pp. 99-106. For an analysis of Schmitt's understanding of representation as developed in the writings preceding *Constitutional Theory*, see John P. McCormick, *Carl Schmitt's Critique of Liberalism. Against Politics as Technology*, Cambridge University Press: Cambridge, 1997, pp. 157-205.

considers to be two related but oppositional principles: identity and representation. I will exploit the oppositional character of these two principles by juxtaposing them, carving out two understandings of collective self-reidentification: collective self-reidentification in an *originalist* sense and a *reflexive* sense. The first one, collective self-reidentification understood in an originalist way, is the one defended by Schmitt and is based on the principle of identity. In Schmitt's interpretation, the act of constitution-making presupposes the existence of a collective subject, which he defines in a reified way as substantial similarity, i.e. sameness.⁴⁶⁹ According to Schmitt, in the act of constitution-making, a collective subject merely determines the 'form and type of the political unity, the existence of which is presupposed'.⁴⁷⁰ The second one, reflexive collective self-(re)identification, is the one I wish to defend, and is based on the principle of representation, albeit in a different reading than that of Schmitt. Representation, in my interpretation, is a performative act that calls into being a collective subject and hence lacks an original to rely on.

Let me begin by analyzing the structure of the originalist understanding of collective self-reidentification on the basis of Schmitt's definition of the principle of identity, which he associates with the democratic state form. According to Schmitt, essential to the democratic state form is that a collective subject is immediately present as a unity 'capable of political action'.⁴⁷¹ That is, in a democracy the members of a collective are immediately self-present as a unity in the moment and place of assembly. In the moment of the assembly a collective subject exists in the mode of 'immediate self-identity'.⁴⁷² Therefore, in Schmitt's view, democracy in the true sense of the word is a direct democracy. 'In a fully implemented direct democracy where the "entire people", all active state citizens, are actually assembled in one place, perhaps the impression arises that the people acts in its immediate presence and identity as the people . . .'.⁴⁷³ The caveat in this passage stems from Schmitt's awareness that there is, as he puts it, a dialectical relation between identity and representation, such that pure identity is never given. It is significant, however, that elsewhere in the *Constitutional Theory*, Schmitt does seem to embrace the principle of identity without reservations. Be it as it may, it is helpful, for our purpose, to reconstruct the principle of identity as sketched out by Schmitt. Indeed, he suggests that a manifold of individuals would exist as an acting unity in an immediate sense at the 'moment' (*Augenblick*) and 'place' (*Platz*) of assembly.⁴⁷⁴ As we will see, the notion of the *Augenblick* is fateful in that it suggests the *original* self-presence of a collective subject. The notion of the *Augenblick* refers to what Jacques Derrida would call a 'source point' of a collective subject's original self-presence, that is, an absolute here and now in which a manifold of individuals is immediately present as a unity.⁴⁷⁵

⁴⁶⁹ Schmitt, *Constitutional Theory*, 2008, p. 102.

⁴⁷⁰ Schmitt, *Constitutional Theory*, 2008, p. 75.

⁴⁷¹ Schmitt, *Constitutional Theory*, 2008, p. 239.

⁴⁷² Schmitt, *Constitutional Theory*, 2008, p. 239, translation altered, MB.

⁴⁷³ Schmitt, *Constitutional Theory*, 2008, p. 240.

⁴⁷⁴ Schmitt, *Constitutional Theory*, 2008, p. 240.

⁴⁷⁵ Jacques Derrida, 'Speech and Phenomena: Introduction to the Problem of Signs in Husserl's Phenomenology', trans. David B. Allison, in *Speech and Phenomena*, Northwestern University Press: Evanston, 1973, pp. 1-104, especially p. 61.

To the extent that a collective manifests itself as an immediate unity in the moment of assembly, self-reidentification requires a collective subject to recover the closure that is constitutive of its original spatio-temporal unity. This means that with regard to its temporal unity a collective subject demonstrates self-constancy when questions such as whether we are a collective and what we are as a collective are answered by referring back to the way in which the members of a collective interpreted the directing idea at the moment of their inaugural assembly. This model of a collective self-reidentification exemplifies what Jean-Luc Nancy defines as the paradigm of the 'lost community': who we are today is defined on the basis of who we were at our founding moment.⁴⁷⁶ This would imply that self-constancy boils down to self-reiteration. The same structure applies to the spatial unity of a collective subject. Spatial self-reidentification amounts to the reiteration of the original spatial closure. Actually, Schmitt's analysis of *nomos* reflects the structure of spatial self-reidentification as self-reiteration. Whereas the act of land-taking effectuates the spatial closure of a collective subject, the subsequent acts of distribution (*teilen*) and exploitation (*weiden*) reiterate the inaugural spatial closure. The members of a collective can re-identify themselves spatially by referring back to the way in which they viewed themselves as a spatial unity at their founding moment.

Key to Schmitt's analysis of the temporal structure of collective self-reidentification as outlined on the basis of the principle of identity is, as mentioned, the notion of the moment (*Augenblick*) of the assembly. Moreover, as the source point of a collective subject's original unity, the moment of assembly implies an opposition between an original act of self-identification, on the one hand, and the reiteration of this original unity in acts of collective self-reidentification, on the other. In *Speech and Phenomena*, Jacques Derrida develops a critique of the notion of the *Augenblick* in the context of Edmund Husserl's phenomenology which is instructive with regard to Schmitt's understanding of the temporal structure of collective self-identification. For although Derrida's analysis of the notion of the *Augenblick* focuses on the individual subject in the act of speaking, it can be read as a deconstruction of the opposition between self-identification and self-reidentification. What is, in Derrida's view, so problematic about the notion of the *Augenblick*?

On the basis of Schmitt's definition of the principle of identity, the moment of the assembly suggests the immediacy of an absolute now in which a collective exists as a unity and in that sense implies 'the privilege of the present-now', as Derrida puts it.⁴⁷⁷ The moment of the assembly marks the point in time in which a collective subject manifests itself as an acting unity in the mode of absolute 'certitude'.⁴⁷⁸ What is so problematic about the definition of the moment of the assembly as the immediate self-presence of a collective as a unity is, in Derrida's view, that it disregards the 'duration' of the *Augenblick*.⁴⁷⁹ For the existential unity of a collective subject is not immediately given but 'must be produced in the present taken as a now'.⁴⁸⁰ This

⁴⁷⁶ Jean-Luc Nancy, *The Inoperative Community*, trans. Peter Connor, University of Minnesota Press: Minneapolis, 1991, p. 9.

⁴⁷⁷ Derrida, 'Speech and Phenomena', 1973, p. 62.

⁴⁷⁸ Derrida, 'Speech and Phenomena', 1973, p. 58.

⁴⁷⁹ Derrida, 'Speech and Phenomena', 1973, p. 65.

⁴⁸⁰ Derrida, 'Speech and Phenomena', 1973, p. 59.

is to say that a collective cannot be found to exist as an immediate unity in the pure instant of the moment of assembly. Instead, it is constituted as a unity in this very moment.

Schmitt conceptualizes the moment of assembly on the basis of the activity particular to a popular assembly, to wit acclamation, an element that Hauriou discusses as a manifestation of communion. “The natural form of direct expression of a people’s will is the assembled multitude’s declaration of their consent or disapproval, the *acclamation*’.⁴⁸¹ To the extent that a manifold of individuals express their will by acclaiming, that is, by ‘a simple calling out’, they seem to act as an immediate unity.⁴⁸² The snag is however that while manifesting itself as a unity in acclamation the collective remains effectively an aggregation of individuals. That is, to the extent that all individuals call out their consent or disapproval at the same time, they can be understood to exist only as a *sum* of individuals. To call out at the same time is not, of itself, to call out *together*. In fact, as Schmitt admits, to the extent that an assembled set of individuals do not call out together, the immediate self-presence of a collective as unity is a ‘fictitious’ (*fingiert*) condition.⁴⁸³ Indeed, as Schmitt notes, ‘at no time or place is there thorough, absolute self-identity of the then present people as a political unity’.⁴⁸⁴ Even in the absolute now of the moment of assembly there remains a difference between the collective as a manifold and as a unity.

The core of Derrida’s argument is that the difference between the collective as a manifold and as a unity has a temporal structure. We cannot say that a collective *is* a unity in an immediate sense in the moment of the assembly and that this unity can be reconstituted *again* in collective self-reidentification. Instead, the moment of collective self-identification ‘has never been nor will ever be present’ as a past and ‘will never be produced or reproduced in the form of presence’ in the future.⁴⁸⁵ That is, the moment of immediate collective self-identification ‘has not taken place’⁴⁸⁶ in some point in time, as Jean-Luc Nancy puts it. Instead, collective self-identification *takes place* through time. Self-identification does not refer to the immediacy of an absolute now, but occurs as a process through time. In fact, to the extent that collective self-identification manifests itself as collective self-emplacement, collective self-identification can be defined as the process of the ‘spacing of time’.⁴⁸⁷ Consequently, the closure that gives rise to the distinction between self and other than self is not an original but a provisional closure. But the crucial question then is in what sense the spatio-temporal unity of a collective subject can still be considered to *exist* when lacking the firm mode of being of an

⁴⁸¹ Schmitt, *Constitutional Theory*, 2008, p. 131, italics in original.

⁴⁸² Schmitt, *Constitutional Theory*, 2008, p. 272.

⁴⁸³ Schmitt, *Constitutional Theory*, 2008, p. 248, translation altered, MB.

⁴⁸⁴ Schmitt, *Constitutional Theory*, 2008, p. 241.

⁴⁸⁵ Jacques Derrida, ‘Differance’, trans. David B. Allison, in *Speech and Phenomena*, Northwestern University Press: Evanston, 1973, pp. 129-160, especially p. 152.

⁴⁸⁶ Nancy, ‘The Inoperative Community’, 1991, p. 11.

⁴⁸⁷ Jean-Luc Nancy, ‘Finite History’, trans. Brian Holmes, in *The Birth to Presence*, Stanford University Press: Stanford, 1993, pp. 143-166, especially p. 163. Cf. Derrida, ‘Differance’, 1973, p. 143.

original unity in a point in time and at a certain place?⁴⁸⁸ How can a collective subject re-identify itself through time when lacking immediate self-presence as a unity?

3.3.2 Reflexive Collective Self-(Re)identification

In order to develop the structure of collective self-(re)identification in a reflexive sense, I will draw on Schmitt's analysis of the principle of representation, which he distinguishes as the second principle of political form besides the principle of identity. This will require radicalizing Schmitt's definition of the principle of representation and 'deconstructing'⁴⁸⁹ the opposition between the principles of identity and representation. In a sense, my Derridian interpretation of the principle of representation is an attempt to come to terms with the ambiguity in Schmitt's definition of the principles of identity and representation in that he views them as 'oppositional' but not 'mutually exclusive' principles of political form.⁴⁹⁰ In fact, while Schmitt has much to say about the temporality of a collective subject in the context of the principle of identity, he has remarkably little to say about it in the context of the principle of representation.

In *Constitutional Theory* Schmitt defines representation as the 'presentation' (*Darstellung*) of a collective as a unity.⁴⁹¹ To the extent that representation also has an integrating function, it can be defined to a greater or a lesser degree as the 'production' (*Herstellung*) of the unity of a collective.⁴⁹² This means that representation does not concern the collective as a manifold of individuals as this would amount to interest advocacy. Instead, representation concerns the unity of a collective as a *whole*.⁴⁹³ And because representation concerns the collective as a whole, it has an existential meaning. Schmitt defines the existential meaning of representation as follows. Representation makes 'an invisible being visible and present through a publicly visible one'.⁴⁹⁴ What Schmitt calls here 'invisible being' refers to the collective as a unity. The representative substitutes for the 'invisible' existence of a collective as a whole. As Schmitt specifies, the representative 'presents and renders concrete the spiritual principle of political existence'.⁴⁹⁵ To a certain extent Schmitt is close here to Hauriou if we take the notion

⁴⁸⁸ This is the central question underlying Nancy's analysis of a political community as an inoperative community. Central to Nancy's analysis of the inoperative community is the distinction between a community defined as a 'common being' (*être commun*) and as a 'being-in-common' (*être-en-commun*). According to Nancy, the interpretation of the mode of being community as a common being presupposes the mode of being-in-common, i.e. the 'inoperative activity' of sharing. See Nancy, 'The Inoperative Community', 1991; also 'La Computation/The Compearance: From the Existence of "Communism" to the Community of "Existence"', trans. Tracy B. Strong, *Political Theory*, vol. 20, no. 3, 1992, pp. 371-398. Interestingly, Nancy develops his ontology of community, amongst others, in discussion with Schmitt political metaphysics. Actually, Nancy often refers to Schmitt in his writings. See for example Nancy, 'The Inoperative Community', p. 17, *Le Sens du monde*, Galilée: Paris, 1993, pp. 139-147, and *Vérité de la démocratie*, Galilée: Paris, 2008, p. 35 and p. 60. Despite Nancy's cogent critique, I find his alternative conception of community too abstract from a political and legal point of view. Therefore, although I will draw on Nancy's ideas to develop an existential concept of collective security, I will do so with some reservation.

⁴⁸⁹ For the notion of 'deconstruction' that I envision here, see Derrida, 'Speech and Phenomena', 1973, p. 52.

⁴⁹⁰ Both these possibilities, identity and representation, do not exclude one another. They are, rather, only two opposing orientation points for the concrete formation of the political unity' (Schmitt, *Constitutional Theory*, 2008, p. 240).

⁴⁹¹ Schmitt, *Constitutional Theory*, 2008, p. 241.

⁴⁹² Schmitt, *Constitutional Theory*, 2008, p. 241.

⁴⁹³ Schmitt, *Constitutional Theory*, 2008, p. 245 and p. 264.

⁴⁹⁴ Schmitt, *Constitutional Theory*, 2008, p. 243.

⁴⁹⁵ Schmitt, *Constitutional Theory*, 2008, p. 245.

of a 'spiritual principle' to refer to the notion of the directing idea.⁴⁹⁶ Recall that Hauriou argues that a representative regime is a constitutive element of an institution and a condition of the realization of the directing idea. According to Hauriou, 'the governmental power of a corporate institution must act *in the name of* the body; its decisions must be considered as those of the body itself. A body is nothing without its organs, and it wills only through them . . .'⁴⁹⁷

The definition of representation outlined by Schmitt presupposes the represented as 'something already present',⁴⁹⁸ namely a collective in the sense of 'the natural existence of a human group living together'.⁴⁹⁹ And notwithstanding the fact that Hauriou defines the foundation of an institution in a more open sense than Schmitt, speaking of 'the continuing foundation'⁵⁰⁰ of an institution, that is, a foundation that is open to future transformations, he also presupposes the original self-presence of the interested group as the 'cause' of an institution.⁵⁰¹ Accordingly, Schmitt and Hauriou both define representation in the sense of *re*-presentation; the representation is the *substitute* of an original. In this respect, Schmitt's definition of representation still presupposes a collective to exist as a unity prior to representation. In Schmitt's view, 'political being preceded constitution making. What is not present politically also cannot consciously decide'.⁵⁰² The definition of representation as substitution risks, however, reifying a collective subject in that it tends to posit collective existence as a 'datum' (*Datum*), a thing, and not as 'acts of individuals' (*Handlungen von Personen*), to borrow Erich Voegelin's wording.⁵⁰³ Therefore, a first-person plural perspective requires a more radical understanding of representation than substitution.

⁴⁹⁶ This existential definition of representations in *Constitutional Theory* builds on Schmitt's analysis of Roman Catholicism, which he conceives as a political model that closely resembles the way in which Hauriou defines the notion of an institution. Carl Schmitt, *Roman Catholicism and Political Form*, trans. G.L. Ulmen, Greenwood Press: Wesport/London, 1996 [1925]. Indeed, Schmitt defines Roman Catholicism as an institution that is concerned with 'the realization of an idea' (p. 5) which provides 'the normative guidance of human social life' (p. 12). In Schmitt's view, 'to the political belongs the idea, because there is no politics without authority and not authority without an ethos of belief' (p. 17). Another political element of Roman Catholicism identified by Schmitt is representation. 'To represent in an eminent sense can only be done by a person, that is, not simply as a "deputy" but an authoritative person or an idea which, if represented, also becomes personified' (p. 21).

⁴⁹⁷ Hauriou, 'The Theory of the Institution', 1970, p. 105, my italics, MB.

⁴⁹⁸ Ernst-Wolfgang Böckenförde, 'The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory', in David Dyzenhaus (ed.) *Law as Politics. Carl Schmitt's Critique of Liberalism*, Duke University Press: Durham/London, 1998, pp. 37-55, especially p. 50.

⁴⁹⁹ Schmitt, *Constitutional Theory*, 2008, p. 243.

⁵⁰⁰ Hauriou, 'The Theory of the Institution', 1970, p. 117.

⁵⁰¹ 'There is a surprising disproportion between cause and effect here [concerning the foundation of an institution, MB]: the duration of an institution will far surpass the longevity of its founders and their wills. We must understand that the organization into a social body and the duration of an institution are imputable not only to the will of the original founders but also to the special quality of the directing idea of the institution founded. This idea, in proportion as it becomes objectified in the social milieu, will keep on attracting new adherents who will be new founders in that they will continue the foundation. The original founders seem to have done more than they had power to do because they have planted in the social milieu a living idea that, once planted, develops by itself' (Hauriou, 'The Theory of the Institution', 1970, p. 118).

⁵⁰² Schmitt, *Constitutional Theory*, 2008, p. 102.

⁵⁰³ Voegelin, 'Die Verfassungslehre von Carl Schmitt', 1931, p. 100. In *Staat, Bewegung, Volk*, Schmitt speaks of the 'immediate presence' (*unmittelbarer Gegenwart*) and 'real presence' (*realer Präsenz*) of a collective as a unity. See Carl Schmitt, *Staat, Bewegung, Volk*, 1933, p. 42.

Indeed, representation does not simply ‘assure’,⁵⁰⁴ as Hauriou puts it, the existence of a collective as a unity but is rather constitutive thereof. As Waldenfels notes, representation is essential to the existential unity of a collective subject because of the simple fact that a collective cannot say ‘we’; a collective cannot speak in first-person plural without some form of representation.⁵⁰⁵ ‘A political group finds its voice only in spokesmen, who speak in its name and represent it *as a whole*’.⁵⁰⁶ This intimates that we should read what Schmitt describes as the ‘dialectic’ of representation in a more radical way than he does himself. If, according to Schmitt, the dialectic of representation entails that ‘the invisible is presupposed as absent and nevertheless is simultaneously made present’,⁵⁰⁷ the representational structure of collective subjectivity implies that a collective is ‘ever absent as a unity in action’.⁵⁰⁸ This is to say that the unity of a collective only exists as a represented unity.⁵⁰⁹ Moreover, to the extent that a representative acts ‘in the name of’ the collective as a whole, he or she *determines* what the collective is as a unity and who is a member thereof. That is, when acting in the name of a collective the representative establishes, on the one hand, *what* interests bind the manifold of individuals and therefore can be viewed as a realization of the directing idea and, on the other, *who* belongs to the interested group bearing the directing idea.

To the extent that a collective does not exist as a unity in an immediate sense but comes into existence through representation, a manifold of individuals can view themselves as a unity only through the mediating role of representation. In this sense, we could say that everything begins with representation, to paraphrase Derrida.⁵¹⁰ The act of a representative enables a manifold of individuals to relate to themselves as a unity. Accordingly, representation is the corner stone of a *reflexive* self-relation of a collective.⁵¹¹ Crucially, the fact that a collective has access to itself only in an indirect way through its representation means that the members of a collective can view themselves as a unity only *retroactively*.⁵¹² This retroactivity means that the existential unity of a collective subject is marked by a delay that cannot be overcome. That is, to the extent that a collective subject exists as a represented unity its temporal mode of being is that of a ‘deferred presence’.⁵¹³ This means that a manifold of individuals can view themselves as a unity only in a provisional sense. Indeed, the representation needs to be backed

⁵⁰⁴ ‘The whole technique of representative organization consists in assuring in practice the reality of this common vision, continuously if possible, periodically at the very least’ (Hauriou, ‘The Theory of the Institution’, 1970, p. 105).

⁵⁰⁵ Bernhard Waldenfels, *Verfremdung der Moderne. Phänomenologische Grenzgänge*, Wallstein Verlag: Göttingen, 2001, p. 140.

⁵⁰⁶ Waldenfels, *Verfremdung der Moderne*, 2001, p. 140, italics in original.

⁵⁰⁷ Schmitt, *Constitutional Theory*, 2008, p. 243.

⁵⁰⁸ Lindahl, ‘Constituent Power and Reflexive Identity’, 2007, p. 18.

⁵⁰⁹ For a thorough analysis of this point, see Bert van Roermund, *Law, Narrative and Reality. An Essay in Intercepting Politics*, Kluwer Academic Publishers: Dordrecht/Boston/London, 1997, pp. 145-169.

⁵¹⁰ Derrida, ‘Speech and Phenomena’, 1973, p. 45, note 4.

⁵¹¹ ‘It is the nature of political consent, which gives rise to the unity of the human community organized and oriented by the State, to be able to be recovered only in an act which has not taken place, in a contract which has not been contracted, in an implicit and tacit pact which appears only in political awareness, in retrospection, and in reflection’, Paul Ricoeur, ‘The Political Paradox’, in *History and Truth*, trans. Charles A. Kelbey, 2007, pp. 247-270, especially p. 252. This article was written by Ricoeur in 1957 as a response to the Hungarian Revolution in 1956. See for an analysis of Ricoeur’s argument, Andrew Schaap, ‘Human Rights and the Political Paradox’, *Australian Humanities Review*, issue 55, 2013, pp. 1-22.

⁵¹² Derrida, *Speech and Phenomena*, 1973, p. 63 and ‘Differance’, 1973, p. 152.

⁵¹³ Derrida, ‘Differance’, 1973, p. 138.

up by the individuals in whose name the representative claims to act.⁵¹⁴ Accordingly, the collective only exists as a *virtual* unity; the temporal and spatial closure established by the representation is but a 'virtual closure',⁵¹⁵ i.e. a possible actualization of collective existence.

The retroactive structure of representation requires reconsidering Schmitt's and Hauriou's opposition between an original act of collective self-identification and subsequent acts of collective self-reidentification. Whereas the opposition between collective self-identification and collective self-reidentification presupposes the direct access of a collective to itself as an original unity in its founding moment, the representational structure of collective subjectivity suggests that the original unity can only be accessed indirectly, through its representations. As a consequence, the inaugural act of collective self-identification always takes place as an act of collective self-reidentification. The retroactive structure of collective self-identification intimates that what is considered to come second effectively comes first. Collective self-(re)identification through time means identifying oneself *anew* rather than identifying oneself *again*. Collective self-identification always takes place as a collective self-(re)identification, and in such a way that the re of reidentification is not merely the recovery of an original spatio-temporal unity but rather a new presentation, and in that sense the creation of an original unity to which there is no direct access.

The representational structure of collective subjectivity requires us to revisit its existence as a spatio-temporal unity. As concerns temporal unity, collective existence is marked by an irreducible openness. Indeed, as Nancy argues, the temporal mode of being of a collective subject has the form of 'the announcement of a 'we'',⁵¹⁶ implying an irreducible openness to reconsider how we viewed ourselves as a collective in the past. According to him, a collective does not exist as an immediate unity here and now but 'comes always from the future'.⁵¹⁷ The fact that a collective subject is representationally structured means that whether we are a unity and what we are as unity is established in the course of a reflexive process of self-(re)identification. In this respect, the radical openness of collective existence intimates the ever present possibility of 'another articulation', both in the sense of who is a member of the collective and what it is that binds them.⁵¹⁸ Moreover, the openness that is characteristic of the temporal structure of collective existence also precludes the possibility of evolving into full self-presence in the future.⁵¹⁹ To the extent that a collective exists as a virtual unity that needs to be renewed

⁵¹⁴ On the notion of representation as a claim, see Michael Saward, 'The Representative Claim', *Contemporary Political Theory*, vol. 5, 2006, pp. 297-318.

⁵¹⁵ Nancy, *Le Sens du monde*, 1993, p. 178, my translation, MB.

⁵¹⁶ Nancy, 'Finite History', 1993, p. 164.

⁵¹⁷ Nancy, 'Finite History', 1993, p. 160.

⁵¹⁸ Nancy, 'Finite History', 1993, p. 164, translation altered.

⁵¹⁹ Such a Hegelian position seems to be defended by Habermas: 'the democratic process is caught in a circular self-constitution that leads to an infinite regress . . . I propose that we understand the regress itself as the understandable expression of the future-oriented character, or openness, of the democratic constitution: in my view, a constitution that is democratic – not just in its content but also according to its source of legitimation – is a tradition-building project with a clearly marked beginning in time. All later generations have the task of actualizing the still-untapped normative substance of the system of rights laid down in the original document of the constitution' (Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?', *Political Theory*, vol. 29, no. 6, 2001, pp. 766-781, especially p. 774). I think it is not a coincidence that Habermas' position represents the exact opposite of Schmitt's as the former is quite frank about the fact that he attempts to develop an alternative to latter's conception of democracy. In order to present his own conception of democracy as an alternative to Schmitt, it is inevitable that

at every turn, it excludes a projected source point in the future in the same sense that it lacks such a source point in the past. Collective self-(re)identification does not simply mean preserving the past in the future but rather taking up the past in the light of the future. To the extent that a collective subject exists as a process of self-(re)identification, the question how it used to view itself in the past is open to the future, and the closure constitutive of the temporal unity of a collective can be redefined accordingly.

As concerns the spatial unity, the reflexive reading of collective self-(re)identification implies a deconstruction of Schmitt's analysis of *nomos*. In Schmitt's interpretation, the act of land-taking establishes the spatial unity of a collective as an original unity, which is reiterated by the subsequent acts of distribution and exploitation. The act of land-taking represents the original act of collective self-identification and the subsequent acts of distribution and exploitation are acts of collective self-reidentification. Put differently, if the act of land-taking is an act of boundary constitution, the acts of distribution and exploitation are acts of boundary enforcement. But in so far that collective existence has a representational structure, the place that a collective occupies can be viewed as its own only retroactively. What a collective views as its own place, that is, the place where it belongs, needs to be determined each time anew. In this respect, to take the land means to *retake* it. Accordingly, rather than reiterating the original spatial unity of a collective, spatial collective self-(re)identification implies constituting its spatial unity *anew*. As a consequence, what appears as boundary enforcement is to a greater or a lesser degree always also boundary constitution, and vice versa.

Crucially, the temporal and spatial structure implied by collective self-(re)identification means that collective existence suffers from irredeemable groundlessness. This groundlessness bespeaks the twofold contingency of collective existence, both *that* it exists as a unity and *what* it is as a unity. In a general sense, contingency concerns the experience that the spatio-temporal unity of a collective always remains a *possible* actualization that need not *necessarily* exist as such.⁵²⁰ This insight followed from the analysis of collective subjectivity in the inter-related modes of identity as sameness and as selfhood but its implications become acute when reflecting on the representational structure of collective subjectivity, that is, the mode of being of collective subjectivity as the same and as a self *through time*. Contingency implies that a collective does not carry within itself the necessity to exist as a spatio-temporal unity, and as the particular spatio-temporal unity with which it exists. In fact, this is the way in which Waldenfels defines contingency. In Waldenfels' interpretation, contingency relates to the transformability of collective existence, that is, the possibility of being otherwise.⁵²¹ According to Waldenfels, to the extent that a collective exists as possibility and is therefore always more possible than

Habermas has to accept the terms of the discussion as set by Schmitt. For Habermas' *Anseinandersetzung* with Schmitt, see Jürgen Habermas, *Die Einbeziehung des Anderen. Studien zur politischen Theorie*, Suhrkamp: Frankfurt am Main, 1996, pp. 154-184 ('Kapitel 5. Inklusion – Einbeziehen oder Einschließen? Zum Verhältnis von Nation, Rechtsstaat und Demokratie').

⁵²⁰ Blumenberg, 'Kontingenz', 1959.

⁵²¹ For Waldenfels' definition of contingency as 'radical contingency', see, among others, his *Vielstimmigkeit der Rede*, 1999, p. 174, *Verfremdung der Moderne*, 2001, p. 18, 'The Boundaries of Orders', *Philosophica*, vol. 73, 2004, pp. 71-86, especially p. 74, and *Hyperphänomene. Modi hyperbolischer Erfahrung*, Suhrkamp: Frankfurt am Main, 2012, p. 85.

actual, it has the potential of becoming 'different from itself'.⁵²² Yet, contingency does not only relate to the problem *what* a collective is as a unity, but also to the problem *that* it exists. Indeed, in the process of collective self-(re)identification, a collective always faces the latent possibility that it exists as a unity rather than not.⁵²³ That is, collective existence does not only lack the necessity within itself for existing in the way it does but also for the fact that it exist as such, which implies that it could just as well not exist.⁵²⁴ Indeed, without representation collective subjectivity has no existence through time, meaning that representation is not only constitutive of what it is as a unity but also that it exists as a unity. Importantly, in so far that contingency concerns the lack of necessity of collective existence, both to its what-ness and its that-ness, it relates to the experience of irreducible groundlessness, that is, the experience of lacking an indubitable ground that secures collective existence as a unity. The twofold contingency of collective existence provides a fundamental insight with respect to the concept of security, namely that the ontological condition of a collective is one of insecurity rather than one of security. A collective is existentially insecure both as concerns that it is a unity and what it is as a unity.

Let us take stock. In this section I have analyzed the structure of collective self-identification through time, which I defined as collective self(re)-identification. In my view, a collective subject exists as the same and as a self through time as representation. To the extent that collective existence has a representational structure, it exists as a virtual spatio-temporal unity that needs to be established at every turn, and not as an original unity that merely needs to be reaffirmed, as Schmitt assumes. This means that representation is constitutive of the collective's existence as possibility. Qua temporality, the existential unity of a collective subject has a retroactive structure. It is not the case that a manifold of individuals first exist as a unity and subsequently act as unity. Instead, representation enables the members of a collective to identify themselves as a unity, although only retroactively. And qua spatiality, the own place of a collective subject is not constituted first in an original act and enforced in subsequent acts. A collective occupies a place and comes to view this place as its own retroactively: occupation is always an alleged re-occupation. This analysis of the notion of existence pertaining to collective subjectivity implies that it is contingent in the twofold sense of its that-ness and its what-ness. The representational structure demonstrates that a collective is always facing the double challenge of the possibility of non-existence and the possibility of being otherwise. This complexity of contingency escapes Schmitt. Indeed, Schmitt's reductive understanding of collective subjectivity leads him to posit it as an original unity and hence to reduce contingency to contingency as that-ness. Interestingly, the reflexive structure of representation is not

⁵²² Waldenfels, 'The Boundaries of Orders', 2004, p. 74.

⁵²³ This is what Heidegger analyzes as the mode of being of *Dasein* of Being-toward-Death. See Heidegger, *Being and Time*, 1996, pp. 219-246.

⁵²⁴ Although Waldenfels defines contingency primarily in the sense of transformability, i.e. the possibility of being otherwise, the problem of contingency as the possibility of non-existence does not escape his attention. According to Waldenfels, 'orders create possibilities and impossibilities, but something that is not made possible is the creation of new order itself' (Waldenfels, 'The Boundaries of Orders', 2004, p. 83). In this sense we could say that whereas Heidegger defines contingency as that-ness *positively* as the possibility of the end of an existing order, Waldenfels defines it *negatively* as the impossibility of the creation of a new order.

only the root of the existential insecurity of collective subjectivity, i.e. of the irreducible groundlessness of collective subjectivity both in the sense of its that-ness and its what-ness, but also entails the possibility of transforming its unity by providing a new representation. Indeed, as we will see, the reflexive, representational structure of collective subjectivity provides it with broader range of possibilities to deal with that which challenges its existence than Schmitt's definition of collective self-preservation as boundary enforcement, since collective self-assertion also includes the possibility of boundary transformation.

3.4 Collective Insecurity

Thus far I have analyzed the insecurity of collective existence on an ontological level. In this section I will turn to discuss how the existential insecurity of a collective manifests itself at the institutional level, i.e. the level of social order. This brings us back to the notion of normal order, indeed, a notion that is central to Schmitt's interpretation of Hauriou's concept of institution. Collective insecurity is induced by abnormality, i.e. abnormal behavior. However, in order to analyze collective insecurity at the institutional level, we will have to redefine Schmitt's notion of normal order. For Schmitt has reified normal order and for that reason supports a reductive understanding of abnormality. Although I will also argue that collective insecurity is rendered visible by abnormality, thus recovering its ambiguous nature in that it comprises both a factual and a normative dimension, abnormality is interpreted by Schmitt as the experience of contingency as that-ness. However, considering that normal order has a reflexive structure and abnormality is the index of both contingency as that-ness and as what-ness, we will have to differentiate the notion of abnormality accordingly. To this end I will distinguish between two manifestations abnormality. Firstly, behavior can be qualified as abnormal to the extent that it *violates* a rule of normal order. And secondly, behavior can be conceived as abnormal in that it *contests* a rule of normal order. These two manifestations of abnormality demonstrate the groundlessness of collective existence, both factually and normatively.

3.4.1 Normal Order

Previously I have compared Schmitt's notion of normal order to Ricoeur's notion of character, i.e. the temporal model of identity as sameness. Recall that Schmitt defines normal order reductively in a reified sense, distinguishing between the normal situation and the normal type of man. Normal order, in Schmitt's interpretation, means that the members of a collective do the same and are the same. However, if understood in a reflexive sense, in the sense of what Ricoeur defines as character, normal order merely indicates the way in which collective existence has become defined in the past. Normal order, in other words, reflects the condition in which the mutual expectations by the members who are engaged in joint action can be assumed to be satisfied by and large. It reflects how a collective *has* configured itself up until now, a configuration that has satisfied the mutual expectations of the individual members but which is at the same time open to reconsideration. This means that normal order has an anticipatory structure. Indeed, essential to a reflexive understanding is that it is about *anticipating* the spatio-temporal unity of collective existence as it has been defined over time, and which

includes possible spatio-temporal unities that are excluded there from. To the extent that normal order is the default setting of collective existence, it not only reflects what possibilities a collective has come to view as its own but also how it has taken a stance towards possibilities that it doesn't view as its own, possibilities that are excluded from a collective's actual spatio-temporal unity. In this respect, the anticipatory structure makes clear that even in the case of normal order the members of a collective are concerned with their existence as a unity, albeit implicitly. This self-relational aspect of the collective as a unity is captured by Ricoeur with the notion of 'self-concern',⁵²⁵ building on Heidegger's notion of *Sorge*, concern or care.⁵²⁶

Self-concern becomes explicit in the case of behavior that is at odds with normal order and hence causes an interruption thereof: abnormal behavior. Abnormal behavior represents an experience of strangeness in that it does not fit within that which the members of a collective view as their own and hence disrupts normal order.⁵²⁷ Indeed, if behavior can be qualified as normal to the extent that it forms a realization of a collective's own possibilities, then those that deviate from it can be labelled as abnormal. It is important to note that the possibility of abnormality inheres in normal order. In fact, the actualization of collective existence comes at the price of excluding other possible behavior, it carries the excluded possibilities with it as its own shadow, as Waldenfels would put it. In this sense, abnormality is what we could call the dependent effect of the process of collective self-(re)identification, as that which can turn itself against this very process by interrupting it. This means that the possibility of an interruption is intrinsic to the process of collective self-(re)identification. Moreover, the latent possibility of being interrupted suggests that a collective has to take a stance towards abnormality if it wants to foreclose the possibility that the process of collective self-(re)identification is interrupted incessantly or even stopped. So, the distinction between normality and abnormality demonstrates that the possibility of insecurity is intrinsic to the possibility of continued existence.

Notice moreover that to the extent that normal order is the situation of collective existence in which the mutual expectations of the members are satisfied by and large, the experience of *individual* insecurity is internally correlated to the experience of collective insecurity. Collective insecurity concerns the experience that the joint action of a manifold of individuals is halted. And, to the extent that collective insecurity presupposes *joint* action of individuals it is irreducible to individual insecurity. However, a situation of collective insecurity, that is, a situation in which the mutual expectations of the members are not being satisfied in its turn also affects the individuals that are engaged in joint action and thus impinges on individual insecurity. Collective insecurity takes away, what Loader and Walker call, the 'tacit confidence'⁵²⁸ individuals have in pursuing their lives. When individuals lose this tacit confidence this may induce an experience of contingency at the level of their individual existence in similar sense as the one that I have been discussing with regard to collective existence. That

⁵²⁵ Ricoeur, *Oneself as Another*, 1994, p. 137.

⁵²⁶ Heidegger, *Being and Time*, 1996, pp. 178-183.

⁵²⁷ Waldenfels, *Hyperphänomene*, 2012, p. 100.

⁵²⁸ Loader & Walker, *Civilizing Security*, 2007, p. 169.

is, collective insecurity can lead to individual insecurity, confronting the individual with existential questions such as ‘Who and what am I?’, questions that it normally takes for granted. From a psychological point of view, we could say that collective insecurity can lead to a situation in which the individual members don’t feel at ease anymore.⁵²⁹ So, while individual and collective (in)security are distinct phenomena they are not independent from one another; rather, individual and collective (in)security are interlaced phenomena.

3.4.2 Abnormality

Analytically speaking, it is possible to distinguish between two manifestations of abnormality. Behavior can be qualified as abnormal to the extent that it *violates* a rule, the following of which is constitutive of normal order. And behavior can be qualified as abnormal in that it *contests* a rule of normal order. The distinction between the two manifestations of abnormality is, as mentioned, analytical. That is, from a conceptual point of view it is possible to distinguish between two forms of abnormality, i.e. two ways in which the interruption of normal order can manifest itself. Yet, to the extent that the qualification of abnormality stems from the interpretation of this behavior from the perspective of the collective in question, abnormality in either of its two manifestations will never appear in its pure form. Moreover, since the qualification of behavior as abnormal presupposes the first-person perspective of a collective, it is marked by an irreducible indeterminacy. The same behavior that was first perceived as a manifestation of one of two forms of abnormality may in the course of a series of events come to be perceived as a manifestation of the other form of abnormality. I will return to the irreducible indeterminacy of abnormality in the next section when discussing its legal qualifications.

Let me start with the manifestation of abnormality in the sense of behavior that violates a rule of normal order. Indeed, if behavior can be qualified as normal because it is in conformity with the rules of normal order, then a first manifestation of abnormality concerns the case in which these rules are not followed, that is, violated. Distinctive about this form of abnormality is that it affects the factuality of normal order and not, at least not primarily, its normativity. Behavior that violates a rule that is constitutive of normal order first and foremost tends to jeopardize the *effectivity* of these rules. Indeed, it affirms rather than negates the normativity of the distinction between normality and abnormality that stems from the directing idea of an institution. In this sense, the violation of a rule seems to represent a moderate form of abnormality. However, in the case that behavior that violates the rules of normal order becomes a regular phenomenon and abnormality thus becomes the effective normal situation, normal order can come to reach the critical point of disintegration or ‘decomposition’,⁵³⁰ a

⁵²⁹ For a psychological definition of insecurity, see Abraham Maslow, ‘The Dynamics of Psychological Security-Insecurity’, *Journal of Personality*, vol. 10, no. 4, 1942, pp. 331-344, especially p. 335: ‘The insecure person, then, perceives the world as a threatening jungle and most human beings as dangerous and selfish; feels rejected and isolated, anxious and hostile; is generally pessimistic and unhappy; shows signs of tension and conflict; tends to turn inward; is troubled by guilt-feelings; has one or another disturbance of self-esteem; tends to be or actually is neurotic; and is generally egocentric or selfish’.

⁵³⁰ Ralf Dahrendorf, *Law and Order*. Stevens & Sons: London, 1985, p. 5.

critical point that cannot be defined in advance. In such situation the distinction between normality and abnormality becomes obsolete; it is then no longer possible to effectively draw this distinction, causing the factual breakdown of collective existence. If the rules that are constitutive of normal order become ineffective, collective existence degenerates into what we could define as a situation of 'anomy' or factual normlessness, that is, 'a state of extreme uncertainty in which no one knows what behavior to expect from others in given situations'.⁵³¹ As I will argue in the next section, this condition of anomy can be defined legally as anarchy.

In order to come grips with this first manifestation of abnormality, let me provide an example. Let me start by saying that I am well aware that an example is never neutral as it always entails a certain framing of the conceptual issue. However, this should not trouble us too much here as I intend to use the example only as a heuristic device. The example concerns a group of tourists who are making a city walk in Antwerp organized by a guide. The idea behind the city walk is to make the tourists familiar with the social geography of Antwerp, particularly with regard to the Russian and the Jewish quarters of the city. All tourists gather at Antwerp Central station for the start of the city walk. Before taking off to the Russian and Jewish quarters of the city, the guide first walks a bit with the group of tourists in the direction of the Meir, the main shopping street in the city center. When the group reaches the Meir one of the tourists decides to leave the group, intending to pay a visit to a shop where they sell an exclusive brand of clothing. The guide chases the person, persuading her not to go shopping and join the others again. However, when the guide returns to the group he finds out that another tourist has disappeared in the meantime, apparently buying some books in a shop at the far side of the street. The guide sighs and mumbles to himself 'in this way we're getting nowhere'.

To begin with, the example of the city walk in Antwerp can be interpreted as an institution in a basic sense in that it includes an interested group that pursues a directing idea (i.e. a city walk with the aim of getting acquainted with the social geography of Antwerp) and somebody who is in charge of the organization (the guide). In order to realize the directing idea, it is essential that the group of tourists stays together following their guide on his way. In this respect, leaving the group in order to go shopping forms an interruption of the city walk and violates the mutual expectations of the group members. In fact, the tourist who is intending to visit the shop of the exclusive brand of clothing discloses *ex negativo* what the group views as the normal order when making a city walk. The rule is to stay together, and not leave the group, if they are to visit the Jewish and Russian quarters together. If staying together as a group is normal, the behavior of the colleagues who leave the group in order to go shopping can be defined as abnormal. The reaction by the guide ('in this way we're getting nowhere') is telling in this regard. For if all the tourists would leave the group and not stay together with the others, then the group would fall apart. In that case it would not make sense to speak of a group and a group activity any longer as each tourist would do whatever he or she wants by him- or herself (shopping, having a drink etc.).

⁵³¹ Dahrendorf, *Law and Order*, 1985, p. 24.

A second manifestation of abnormality concerns behavior that contests a rule. What is challenged in this manifestation of abnormality is primarily the normativity of the rule, and not its effectiveness. Abnormal behavior that implicitly or explicitly contests a rule raise the question as concerns the reason to follow the rule: whence does the rule derive its normativity? In this sense, abnormal behavior calls into question what counts as normal order and hence the distinction between normality and abnormality. Moreover, to the extent that the contested rule is part of normal order and in that sense is part of realizing the directing idea, abnormal behavior challenges the directing idea, that is, the normative principle underlying the distinction between normality and abnormality. More precisely, by challenging the way in which the institution draws the distinction between normality and abnormality, the behavior suggests other possible ways of drawing this distinction on the basis of the directing idea. The contestation of a rule can be experienced as being so severe that it amounts to a negation of the directing idea. In case the contestation of a rule leads to the failure of the directing idea, the upshot of the second manifestation of abnormality can be the same as the first one. For if the directing idea of the institution fails, a collective loses its constitutive principle. And in the absence of its constitutive principle, collective existence collapses into a condition of anomy, i.e. a situation in which the 'social effectiveness' of rules 'tends towards zero' as these rules have lost their normativity.⁵³²

To illustrate the second manifestation of abnormality, let me turn to another example. Take the (fictive) case of a European company in renewable energy such as windmills and biogas that takes over an oil company in the Middle East in order to increase its market share in that part of the world. Some shareholders of the company express their disagreement with the company's strategy in a newspaper, arguing that oil production does not fit within the company's business in renewable energy. Actually, one of them proposes in an interview broadcasted on television to reformulate the company's mission statement into 'making filthy money with energy' and to get rid of all of the company's environmental aspirations, such as financing an endowed chair on the technological possibilities of renewable energy at a high ranked university. Interestingly, the decision to purchase the oil company was not taken unanimously by the management. The management was divided whether a business in renewable energy could include business in oil. However, although the company so far only did business in the area of renewable energy the mission statement of the company speaks of 'making profit with energy' in a non-exclusive sense. The management meeting resulted in a heated debate about the company's mission statement. The CEO took the decision that oil production fits the corporate profile as it not only increases profits on a short and middle term but also provides the possibility to gain foot on the ground in Middle East with renewable energy. At the next shareholders meeting the CEO has to explain why the management didn't decide otherwise.

This example draws already on a more refined notion of an institution than in the case of group of sightseeing colleagues. In fact, Hauriou mentions the commercial corporation

⁵³² Dahrendorf, *Law and Order*, 1985, p. 26.

as example of an institution.⁵³³ First of all, the company entails an interested group, including the shareholders, management and employees, who are engaged in realizing the directing idea, namely, making money with energy. Secondly, the management, with the CEO at the top, is in charge of the company's organization and acts as the company's representative. And thirdly, the shareholders demonstrate what Hauriou would call a 'manifestation of communion' as they suggest discontentedly that the company's mission statement should be redefined as making 'filthy' money. The rule that is contested by the purchase of the oil company is that of generating profit with renewable energy. In this regard, central to the example is the interpretation of the directing idea. For whereas the purchase of an oil company can be considered normal from the perspective of a company that seeks to make money with energy production, preferably though not exclusively renewable, it can also be defined as abnormal if the company's core business is renewable energy and thus consists in making money in an ecologically sustainable way. Interestingly, the CEO's decision to include oil in the company's portfolio and thus to consider it as a normal business activity remains contestable as demonstrated by the statement of some shareholders. In case the directing idea comes to be defined differently as a result of the shareholders meeting, putting the ecological sustainability of energy production first and profit second, it could be the case that the company decides to split itself up in accordance with the types of energy production (renewable and oil) and thus ceases to exist as the company that it was.

Abnormality functions as the index of contingency. While the two forms of abnormality both disclose the contingency of collective existence, they do so in a different way. To the extent that behavior violates a rule of normal order it cannot be viewed as being part of the institution. That is, abnormal behavior that violates a rule cannot be grounded in the institution. In the case of a singular occurrence of such abnormal behavior normal order is affirmed rather than radically challenged. However, in case of multiple instances of behavior that violate the rules of normal order, a critical point can be reached where the effectiveness of normal order breaks down. If this critical point is reached then the institution ceases to exist in a factual sense and the distinction between normality and abnormality as drawn by the institution becomes obsolete. And in so far that the distinction between normality and abnormality loses its effectiveness, it becomes groundless. The groundlessness of the distinction between normality and abnormality demonstrates the contingency of collective existence in that it intimates the possibility that a collective can effectively cease to exist. If violating the rule becomes normality, it is no longer possible to speak of a collective that is engaged in realizing its directing idea. So, the first manifestation of abnormality predominantly relates to contingency in the sense of the that-ness of collective existence; or rather, contingency as that-ness and what-ness remain indistinct here, since contingency as what-ness is reduced to contingency as that-ness. To the extent that the violation of a rule negates what a collective is, it poses a challenge to the collective's existence/non-existence.

The problem of contingency surfaces in a different way in the case of abnormal behavior that contests a rule. Behavior that contests a rule can be considered to call into question

⁵³³ Hauriou, 'The Theory of the Institution', 1970, p. 101.

what ought to count as normal order. To the extent that abnormal behavior suspends the definition of normal order, it intimates a suspension of the normativity of the distinction between normality and abnormality. Therefore, in contrast to the other form of abnormality, it is not simply the case that behavior cannot be grounded in the institution. Rather, behavior challenges both what ought to and what ought not to be grounded in the institution. By challenging the distinction between normality and abnormality, behavior reveals that normal order is without indubitable ground and therefore open to contestation and reconsideration. In this sense, abnormality in the sense of the contestation of a rule discloses the contingency of collective existence in that it intimates the irreducible incapacity of a collective to definitively establish what ought to count as normal order, leaving open the possibility to transform itself in such a way that it accommodates that which challenges it. This suggests that the contestation of a rule relates predominantly to contingency in the sense of the what-ness of collective existence. But to the extent that behavior that contest a rule intimates a *possible* spatio-temporal unity of collective existence, it is not certain whether the collective can view this spatio-temporal unity as its own, that is, if the intimated spatio-temporal unity represents a possibility or an impossibility of collective existence. In the ultimate case, when the spatio-temporal unity intimated by abnormal behavior represents an *impossible possibility*, i.e. a possibility that a collective cannot actualize as its own other than by ceasing to exist as a unity, it forms a negation of collective existence. This implies that the contestation of a rule does not only concern contingency as what-ness but also as contingency as that-ness. There are, in other words, limits to the transformability of collective existence.

The above discussion of abnormality takes further the analysis of existential insecurity outlined in sections 3.2 and 3.3 in that it shows how the twofold contingency of collective existence manifests itself at the level of an institution. Drawing on a reflexive understanding of normal order, I have sought to demonstrate that abnormality always challenges a collective both as to what it is as a unity and that it is a unity; abnormality always entails contingency as what-ness and as that-ness. My analysis of abnormality reveals that Schmitt's account thereof is reductive. To the extent that Schmitt has a reified understanding of normal order, he does not differentiate between intensities of abnormality, defining it exclusively as threat to the that-ness of collective existence, i.e. as an existential threat. Indeed, by defining abnormality in terms of contingency as that-ness, for Schmitt abnormality is perforce a *threat* to collective existence. But abnormality can also challenge a collective to transform what it is as a unity. In fact, it is for this reason that I prefer to speak of challenges rather than threats. For to the extent that abnormality can *challenge* a collective to change its unity, a collective has more options to respond than mere boundary enforcement as Schmitt claims. Indeed, a collective can also respond to abnormality by means of boundary constitution. *Abnormality, as the source of insecurity, both threatens and opens up new opportunities, new possibilities for collective existence.*

3.5 Public Order

Now that we have analyzed the existential insecurity of a collective at the ontological and institutional levels the time is ripe to discuss the legal manifestations of collective insecurity

that feed into the notion of public order. To the extent that public order is the legal manifestation of the contingency of collective existence, i.e. a collective's irreducible groundlessness, I will argue that it revolves around the problem of *anarchy*.⁵³⁴ In fact, I will distinguish between two forms of anarchy, namely in a factual and a normative sense. The distinction between factual and normative anarchy relates to the two manifestations of abnormal behavior analyzed in the previous section, respectively, the violation and contestation of a rule and their legal qualifications. The legal qualification of abnormal behavior that violates a rule and that anticipates the possibility of factual anarchy is *illegality*. The legal qualification of abnormal behavior that contests a rule and entails the possibility of normative anarchy is *the exception*. Moreover, later on in this section we will have to make a distinction between two definitions of the exception, a weak and a strong one. The weak form of the exception concerns behavior that is conceived as a case of illegality but claims to represent a case of legality. The strong form of the exception on the other hand concerns behavior that is taken to qualify as a case of illegality but definitively resists the legal-illegal distinction as posited by a legal order.

Relating it to the problem of anarchy, my discussion of public order shows that Schmitt has a reductive interpretation thereof on the basis of his notion of the exception. Recall that, in Schmitt's interpretation, public order comprises behavior that is not circumscribed in legal order and hence can be considered to defy the distinction between legality and illegality. For this reason Schmitt defines the exception as the legal qualification of public order, and not illegality. Whereas, in Schmitt's view, illegality affirms the legal order *ex negativo* and thus presupposes a condition of factual normality, the exception on the other hand calls this factual normality into question, deviating from it. Now, I will identify a broader range of legal manifestations that feed into the notion of public order than Schmitt. But this broadened understanding of public order relates to what was said earlier about the twofold contingency of collective existence entailed in abnormality. Whereas Schmitt assumes public order to concern *threats*, i.e. contingency as that-ness, that calls forth boundary enforcement, I will argue that public order comprises *challenges* to collective existence, entailing contingency both as that-ness and as what-ness, that can be responded to by acts ranging between boundary enforcement and boundary constitution.

3.5.1 Factual Anarchy

Before turning to discuss the legal manifestations of collective insecurity, let me start with the legal qualification of normal order: *legality*. To the extent that, in Schmitt's interpretation, legal order is a formal codification of the rules that constitute 'social normality',⁵³⁵ we could say that legality consists of the default settings of joint action. That is, legality refers to the whole of possible behavior available under the directing idea of an institution, i.e. to the collective's *own*

⁵³⁴ The concept of anarchy, in its modern interpretation, relates to the metaphysical notion of chaos. See Marina Kurdzialek, Ulrich Dierse & Rainer Kuhlen, 'Chaos', in: Joachim Ritter, Karlfried Gründer & Gottfried Gabriel (eds.), *Historische Wörterbuch der Philosophie*, vol. I, Wissenschaftliche Buchgesellschaft: Darmstadt, 1971, pp. 980-984, especially p. 983. For an extensive discussion of the notions of anarchy and anarchism, see Ulrich Dierse, 'Anarchie, Anarchismus', in Joachim Ritter, Karlfried Gründer & Gottfried Gabriel (eds.), *Historische Wörterbuch der Philosophie*, vol. I, Wissenschaftliche Buchgesellschaft: Darmstadt, 1971, pp. 267-294.

⁵³⁵ Croce & Salvatore, *The Legal Theory of Carl Schmitt*, 2013, p. 60.

possibilities, as instituted in the legal order. Behavior that qualifies as legal is enabled by legal norms and hence included in a collective's 'program of action' (*plan d'action*), as Hauriou puts it felicitously.⁵³⁶ In so far that normal order integrates a factual and a normative dimension, legality is the situation in which the legal order is both effective and valid. Of course, it can be the case that a member of a collective is not sure in a certain situation how to behave in conformity with legal norms. This need not concern a case of abnormality. Rather, in such a situation the individual simply does not know what legal norm applies and how he or she is expected to behave in order to satisfy the mutual expectations stemming from the directing idea.

The legal qualification of abnormal behavior that violates a legal norm is illegality. A simple example of illegal behavior is theft. We could say, first of all, that in the sense that theft violates a legal norm, i.e. property rights, it reveals the normal condition of legal order *ex negative*, affirming the distinction between legality and illegality set by legal order, that is, the distinction between the collective's own possibilities and those that are excluded therefrom.⁵³⁷ In other words, theft represents an instance of disorder in that it implies a breach of the factual normality codified by the legal norm. To the extent that the conceptual pair of legality and illegality forms a binary opposition, illegality, qua disorder, represents a possibility of legal order. In effect, the fact that illegality is a structural possibility of legal order implies that legal disorder is embedded in legal order. In this respect, we could define illegality as 'the privative manifestation of legal order'.⁵³⁸

Yet, this definition of illegality only focuses on its normative dimension, leaving aside the implications with regard to the effectiveness of legal order. For despite the fact that theft reaffirms the validity of the distinction between legality and illegality as drawn by a legal order, it can, at least potentially, pose a severe challenge to the effectiveness of legal order. In fact, if theft is committed on a large scale by a substantial part of the population and deteriorates into prolonged and uncontrollable looting, then the very distinction between legal and illegal acquisition of goods tends to fall apart. More precisely, legal order can reach a critical point when the correspondence between the validity and the effectiveness of legal order drops below what Kelsen calls 'a specified minimum', meaning that in the case of a sufficient number of instances of theft the distinction between legality and illegality may lose its grip on the behavior of individuals and hence ceases to be effective.⁵³⁹ Although in a general sense 'the inefficacious norm remains valid because and in so far as it is part of . . . a valid legal system',⁵⁴⁰ the legal order may collapse if the number of inefficacious norms becomes too big. If illegality would become the normal condition, legal order can reach the critical point in which the distinction between

⁵³⁶ Hauriou, 'The Theory of the Institution', p. 101.

⁵³⁷ Lindahl, 'Border Crossings by Immigrants', 2008, p. 127, *Fault Lines of Globalization*, 2013, p. 28; Oudejans, *Asylum*, 2011, p. 159.

⁵³⁸ Lindahl, *Fault Lines of Globalization*, 2013, p. 28.

⁵³⁹ 'The validity of a legal system governing the behaviour of particular human beings depends in a certain way, then, on the fact that their real behaviour corresponds to the legal system – depends in a certain way, as one also puts it, on the efficacy of the system. This relation of dependence . . . can only be defined in terms of an upper and a lower limit. The possibility of correspondence may neither exceed a specified maximum nor fall below a specified minimum' (Kelsen, *Introduction*, 1992, p. 60).

⁵⁴⁰ Kelsen, *Introduction*, 1992, p. 62.

legality and illegality ceases to be effective and hence is emptied of normativity. The upshot of such a factual retrogression of legal order is a situation of ‘anarchistic insecurity’.⁵⁴¹ Of course, this does not mean that a singular instance of theft will necessarily result in factual anarchy. What the gliding scale between theft and looting suggests is that illegality entails the latent possibility of factual anarchy, i.e. anarchy in the sense of factual lawlessness. It is in this sense that illegality can lead to an experience of contingency. Abnormal behavior that qualifies as illegal is groundless in that it violates the mutual expectations of the members of a collective and in that sense it can be experienced as a challenge to collective existence. Later on I will show that the relation between illegality and anarchy explains and to a certain extent also justifies boundary enforcement.

The link between illegality and factual anarchy allows me to draw attention to an issue that is clearly neglected by Hans Lindahl in his analysis of legal order and the distinction between illegality and a-legality.⁵⁴² Whereas normal order includes both the dimension of factuality and validity,⁵⁴³ Lindahl focuses mainly on the latter, relating the problem of chaos or anarchy to the normativity of legal order, not developing this point with respect to the effectiveness of legal order. That is, Lindahl discusses anarchy predominantly as a normative problem, i.e. what I shall define as normative anarchy. My discussion of the link between illegality and factual anarchy on the basis of a radicalized reading of Schmitt fills the lacuna in Lindahl’s analysis. In *Political Theory*, Schmitt notes that ‘the exception is different from anarchy and chaos’;⁵⁴⁴ ‘the exception is distinguishable from a juristic chaos, from any kind of anarchy’.⁵⁴⁵ Schmitt suggests that the problem of anarchy *precedes* the problem of the exception. Schmitt’s distinction between anarchy, in the sense of factual lawlessness, and the exception suggests that illegality poses a challenge to legal order as severe as or even more fundamental than the exception, albeit potentially. For whereas the exception can cause an experience of normative anarchy, illegality comprises the latent possibility of factual anarchy. Indeed, if factual anarchy concerns the situation in which the effectiveness of legal order drops below a critical minimum, the exception still presumes what Schmitt calls a situation of ‘factual normality’⁵⁴⁶ (*faktische Normalität*) as that from which it deviates. My distinction between factual and normative anarchy implies that Lindahl’s hierarchization between *secondary* challenges, i.e. illegal behavior that call forth boundary enforcement, and *primary* challenges, i.e. a-legal behavior that call forth

⁵⁴¹ Schmitt, *On the Three Types*, 2004, p. 62.

⁵⁴² Lindahl, *Fault Lines of Globalization*, 2013, especially pp. 13–43 and pp. 156–186.

⁵⁴³ ‘Every general norm demands a normal, everyday frame of life to which it can be factually applied and which is subjected to its regulations. The norm requires a homogeneous medium. This effective normal situation is not a mere “superficial presupposition” that a jurist can ignore; that situation belongs precisely to its immanent validity. There exists no norm that is applicable to chaos’ (Schmitt, *Political Theory*, p. 13).

⁵⁴⁴ Schmitt, *Political Theory*, 1985, p. 12.

⁵⁴⁵ Schmitt, *Political Theory*, 1985, p. 14. According to Saul Newman, Schmitt’s ‘subterranean dialogue’ with anarchism reveals whom he recognized as ‘his true ideological enemies’. See Saul Newman, ‘Crowned Anarchy: Postanarchism and International Relations Theory’, *Millennium. Journal of International Studies*, vol. 40, no. 2, 2012, pp. 259–278, especially p. 269. In a highly suggestive but amusing article, Nicolaus Sombart, a German cultural sociologist who was mentored in his youth by Schmitt, claims that the root of Schmitt’s ‘Angst vor dem Chaos’ is the fear of his own sexuality. See Nicolaus Sombart, ‘Die Angst vor dem Chaos. Zum Carl-Schmitt-Syndrom’, *Merkur. Deutsche Zeitschrift für europäisches Denken*, vol. 40, no. 498, 1990, pp. 638–651.

⁵⁴⁶ Schmitt, *Political Theory*, 1985, p. 13.

boundary constitution, is erroneous. For what Lindahl calls ‘secondary’ challenges have the same status, at least potentially, as ‘primary’ challenges.

3.5.2 Normative Anarchy

Illegality is however but a first legal qualification of abnormality, indeed, the qualification of abnormal behavior that violates a rule of normal order. In order to develop the legal qualification of behavior that contests legal norms, I will critically redefine Schmitt’s notion of the exception. Reconsidering Schmitt’s analysis I will argue that he takes together two possible definitions of the exception. In Schmitt’s interpretation, the exception concerns behavior that resists subsumption under the norms of the legal order. In Schmitt’s view, the exception is ‘that which cannot be subsumed’ in the legal order in that it ‘defies general codification’;⁵⁴⁷ ‘the exception, which is not codified in the existing legal order, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a preformed law’.⁵⁴⁸ Schmitt’s notion of the exception covers two definitions that he leaves undifferentiated. Firstly, behavior that is not but possibly can be included in the legal order. This would concern behavior that initially qualifies as illegal but is claimed to represent a case of legality. This first definition refers to what I will denote as the weak form of the exception. Secondly, the exception can refer to behavior that fundamentally resists inclusion in the legal order. Whilst such behavior is taken as a case of illegality, it actually resists qualification in terms of the legal-illegal distinction, intimating another legality altogether. This second definition concerns the strong form of the exception. This differentiation between the two definitions of the exception is crucial in that in its weak form the exception challenges a collective to transform its actual spatio-temporal unity. That is, the weak manifestation of the exception implies a notion of security that can accommodate boundary constitution, besides boundary enforcement.

Let me start with the weak form of the exception, in fact an understanding of the exception that Schmitt doesn’t deal with. Initially, behavior that cannot be qualified as legal represents a case of illegality. However, such an analysis is reductive in the case of behavior that can neither be subsumed under a legal norm nor as simply breaching a legal norm. Rather, such behavior seems to imply a suspension of the distinction between legality and illegality as drawn by the legal order. Indeed, behavior can be viewed as suspending the distinction between legal and illegal to the extent that it *contests* this distinction. Insofar as behavior cannot be folded into the register of legality or illegality, it can be viewed as a contestation of the legal-illegal distinction drawn by legal order. In fact, in the case of the contestation of a legal norm, behavior can be interpreted as intimating a form of legality that is excluded from legal order, i.e. a possible spatio-temporal configuration of collective existence that is different from the default setting instituted by legal order. In this respect, the ‘unsubsumable’ character of behavior implies a normative challenge to collective existence in that it induces the collective to redefine the distinction between legality and illegality. Simply dismissing behavior that contest

⁵⁴⁷ Schmitt, *Political Theology*, 1985, p. 13.

⁵⁴⁸ Schmitt, *Political Theology*, 1985, p. 6, my emphasis, MB.

the distinction between legal and illegal as illegal would imply ignoring the normative claim that it entails.

The weak form of the exception can be exemplified with the phenomenon of animal rights activism. Albeit animal activism is a differentiated phenomenon that can be driven by a range of different reasons, characteristic of animal rights activism is that it aims at improving the well-being and living conditions of animals.⁵⁴⁹ Although animal rights activism often makes use of violence, the violence committed is generally directed at a well-defined target, such as breeding farms or industries that make use of animal testing when developing of their products. Whereas the behavior of (groups of) animal rights activists can be considered as a violation of legal order and for that reason should be qualified as a case of illegality, it can also be viewed as a contestation of the distinction between legality and illegality as set by legal order. Simply qualifying animal rights activism as illegal would fail to register the normative challenge that it presents to legal order, to wit the inclusion of animal rights in legal order. In this sense, animal rights activism challenges the normative ground of legal order. Animal rights activists intimate that the distinction between legality and illegality could and should be drawn otherwise, accommodating an improved legal protection of animals.

To the extent that behavior qualifies as a weak manifestation of the exception, we could say that it *negates* legal order in so far that it questions what possibilities are included in legal order. Now, the figure of the negation reappears in a more radical form in the case of a strong manifestation of the exception. Whereas in its weak form the exception concerns behavior that contests how an institution draws the distinction between legality and illegality, the strong form of the exception concerns behavior that contests the directing idea of the institution itself, intimating another directing idea. In fact, distinctive of behavior that qualifies as a strong form of the exception is that it contests the distinction between legal and illegal by *definitively* resisting inclusion in either one of the two sides of the distinction. That is, behavior intimates a spatio-temporal unity of collective existence whose realization is irreconcilable with the collective's directing idea altogether. In the most radical case, the realization of such behavior would lead to the extinction of the collective's existence, as no possible spatio-temporal unity is availed by the directing idea can accommodate it. This is what we could define as 'a case of extreme peril, a danger to the existence of the state', as Schmitt puts it. Paradoxically, to the extent that behavior definitively eludes the distinction between legality and illegality as posited by legal order, it cannot but be qualified as the definitive affirmation thereof and hence as a case of illegality.⁵⁵⁰ Therefore, as we will see, behavior that is qualified as a strong form of the exception cannot but be responded to by boundary enforcement.

For Schmitt, behavior that qualifies as a strong form of the exception falls under the political category of enmity. For essential to enmity is the problem of an 'existential negation',⁵⁵¹ that is, a negation both of what we are as a collective and that we are a collective.

⁵⁴⁹ See the report by the Dutch Ministry of the Interior and Kingdom Relations, *Dierenrechtenactivisme in Nederland. Grenzen tussen vreedzaam en vlammend protest* [Animal rights activism. Boundaries between peaceful and flaming protest], July 2004.

⁵⁵⁰ Lindahl, 'Border Crossings by Immigrants', 2008, p. 129, n. 12.

⁵⁵¹ Schmitt, *The Concept of the Political*, 2007, p. 33.

Indeed, to the extent that inimical behavior intimates another directing idea, it implies an 'intense and extreme antagonism',⁵⁵² as Schmitt would have it, between the directing idea of an institution and the one intimated by the hostile behavior. Therefore, in Schmitt's interpretation, characteristic of the enemy is that s/he is so radically different from collective existence that her or his behavior requires the negation of 'the [collective's, MB] own form of existence'.⁵⁵³ Moreover, if inimical behavior entails the use of violence as an 'intended means', it can be defined as *terrorism*.⁵⁵⁴ Schmitt definition of the enemy is based on the idea that it is not simply a manifestation of otherness but rather of strangeness, i.e. otherness as strangeness. As he notes in *Constitutional Theory*, 'in conceptual terms, the enemy is something existentially other (*Anderes*) and strange (*Fremdes*), the most extreme escalation of otherness (*Anders-Seins*) . . .'.⁵⁵⁵ In this regard, Schmitt's definition of the enemy illustrates something that we have also observed with respect to his understanding of abnormality. Schmitt does not differentiate between levels of intensity in which otherness may manifest itself but reduces it to its most radical manifestation, i.e. otherness as strangeness. As I have been at pains to argue, from this reductive understanding of otherness follows his reductive interpretation of contingency, which he understands in the sense of contingency as that-ness.

Importantly, the political qualification of enmity presupposes the first-person plural perspective of an interested group of people 'who run a personal risk in the success or failure of the enterprise', as Hauriou formulates it. This means that the notion of enmity presupposes the perspective of the collective *as a whole*, and therefore involves a different form of victimization from, say, an act of murder in which an offender kills an individual. The second implication of the fact that enmity presupposes a first-person plural perspective is that it is a both an absolute and a relative concept. Absolute, in that inimical behavior negates the ground of collective existence, aiming at the destruction of collective existence. Relative, in that the qualification of behavior as inimical presupposes a decision to be qualified as such by the sovereign. Notice that the relational character of enmity also holds for all other political and legal qualifications by a collective and marks the irreducible indeterminacy of behavior. I will return to discuss this problem in Chapter 4 when exploring the implications of my concept of security in relation to the securitization theory.

Bearing in mind the irreducible indeterminacy of political and legal qualifications, an example of the strong form of the exception might be the attacks by Muslim fighters in Western countries to the extent that they are proclaimed by Jihadist groups such as Al Qaeda and Islamic State. Take for example the attack on the Curtis Culwell Center in Garland, Texas on May 3, 2015.⁵⁵⁶ The attack on the Curtis Culwell Center was directed against an exhibition of cartoon images of Muhammed organized by Stop Islamization of America, also known as the American Freedom Defense Initiative, an organization that describes itself as 'a human rights organization dedicated to free speech, religious liberty and individual rights' but is widely

⁵⁵² Schmitt, *The Concept of the Political*, 2007, p. 29.

⁵⁵³ Schmitt, *The Concept of the Political*, 2007, p. 27.

⁵⁵⁴ Willem Schinkel, *Aspects of Violence. A Critical Theory*, Palgrave Macmillan: Basingstoke, 2010, p. 145.

⁵⁵⁵ Schmitt, *Constitutional Theory*, 2008, p. 394.

⁵⁵⁶ See https://en.wikipedia.org/wiki/Curtis_Culwell_Center_attack (accessed 21 June 2015).

known for its Islamophobia.⁵⁵⁷ The attack on the Curtis Culwell Center was carried out by two men but was proclaimed by Islamic State as their first attack on the mainland of the United States, even though it's unclear at this moment of time whether this link really exists. To the extent that the groups involved in jihadism like Islamic State base their 'struggle to maintain the religion'⁵⁵⁸ on a radical interpretation of Islamic faith and sharia law, they can be perceived as an existential negation of Western liberal democratic societies. In this sense, the attack on the Curtis Culwell Center can be interpreted – but, considering the irreducible indeterminacy of political and legal qualifications, need not be interpreted – as an attack on the existence of Western liberal democracies as such to which the freedom of expression is quintessential, and not merely as an attack on the right to free speech. Put differently, in a certain interpretation the view of collective existence propagated by jihadist groups arguably can only be accommodated by Western liberal democracy on the condition that the Westerners could no longer recognize it as their own. In this sense, the view of collective existence propagated by jihadists can be viewed as incompatible with Western liberal democracy. Moreover, when jihadist groups make use of violence in their quest to reform non-believers, the authorities in a Western liberal democracy may be prepared to qualify their behavior as a terrorist act.⁵⁵⁹

Crucially, to the extent that the exception, in both its weak and its strong forms, concerns behavior that negates the distinction between legality and illegality, it challenges the normative ground of this distinction. That is, the exception, in either of its two manifestations, calls into question 'the beginning (in the sense of *Arche*)'⁵⁶⁰ of legal order: the directing idea, the constitutive principle of collective existence. Behavior that qualifies as an exception negates, in its weak form, the *arche* of the distinction between legality and illegality by intimating other possible ways to draw it, or else, in its strong form, requires the destruction of the *arche* in order to clear the way for a new one. As I have argued, the weak manifestation of the exception completely escapes Schmitt's attention as he defines the notion of the exception as the legal manifestation of the most radical form of otherness, otherness as strangeness. On the basis of my broadened interpretation of the exception we could say that it demonstrates, both in its weak and its strong manifestation, the 'an-archic'⁵⁶¹ existence of a collective, that is, the irreducible groundlessness of collective existence in a normative sense. The experience of normative groundlessness relates to what we have defined as contingency in its twofold of sense of the that-ness and what-ness of collective existence. In terms of the weak form of the exception abnormal behavior is primarily viewed as a challenge to the what-ness of collective existence intimating another actualization thereof and in that sense also challenges the that-

⁵⁵⁷ See https://en.wikipedia.org/wiki/Stop_Islamization_of_America (accessed 22 June 2015).

⁵⁵⁸ This is the general, Arabic definition of jihad. See <https://en.wikipedia.org/wiki/Jihad> (accessed on 12 June 2015).

⁵⁵⁹ See in this regard the report in *Le Monde* on the attack on the Jewish Museum of Belgium in Brussels on 24 May 2014: http://www.lemonde.fr/europeennes-2014/article/2014/05/26/tueur-du-musee-la-belgique-choisit-une-juridiction-competente-en-matiere-de-terrorisme_4426217_4350146.html (accessed 21 June 2015).

⁵⁶⁰ Schmitt, *On the Three Types*, 2004, p. 62.

⁵⁶¹ I borrow this notion from Reiner Schürmann, 'Questioning the Foundations of Practical Philosophy', *Humans Studies: A Journal for Philosophy and the Social Sciences*, vol. 1, no. 4, 1978, pp. 357-368, especially p. 367. Cf. Lindahl, *Fault Lines of Globalization*, 2013, p. 170.

ness of the collective existence. In terms of the strong form of the exception abnormal behavior appears primarily as a threat to the that-ness of collective existence as it excludes that any possible actualization of collective existence can accommodate it.

Anarchy as the normative groundlessness of the distinction between legality and illegality is different from anarchy as factual lawlessness. Whereas factual anarchy concerns the retrogression of an effective and valid legal order into factual lawlessness, the exception boils down to suspending the normative ground of legal order. This suspension may also come to affect the legal order's factual normality, implying that normative anarchy can result effectively in the collapse of legal order and deteriorate into a situation of factual anarchy. At bottom, both illegality and the exception hinge upon the possibility of legal order degenerating into a situation of factual lawlessness, i.e. the possibility of retrogressing from the 'stately condition of peace, security and order' into 'the anarchistic condition of total disorder and insecurity', to borrow Schmitt's Hobbesian phrasing.⁵⁶²

In sum, complementing the analysis of collective insecurity at the ontological and institutional level, in this section I have identified the legal manifestations of abnormality that feed into the notion of public order, to wit illegality and the exception. What this analysis suggests is that the way in which a collective approaches abnormal behavior is variable and dependent on how a collective interprets this behavior, either primarily as a challenge to the that-ness or the what-ness of its existence. This differentiated account means, first of all, a broadening of the notion of public order, relating it to the problem of anarchy both in its factual and its normative meaning. But, secondly, the fact that the interpretation of behavior is variable also means that public order includes challenges to collective existence that may induce a transformation of its spatio-temporal unity. That is, public order gives way to boundary constitution, and not merely to boundary enforcement. Consequently, the differentiated interpretation of public order suggests that the range of possibilities of collective to respond to it is also variable or at least broader than the way in which Schmitt understands it, namely, as boundary enforcement.

3.6 Security

The previous sections have been devoted to collective insecurity from ontological, institutional and legal perspectives. The central idea that I have developed at these different levels is that a collective is existentially insecure in the twofold sense that a collective cannot guarantee *that* it exists as a unity and *what* it is as a unity. Bearing in mind this characterization of the insecure existence of a collective, in this section I will define security as *collective self-assertion*, revisiting Schmitt's concept of security as collective self-preservation. Whereas Schmitt defines security as boundary enforcement, that is, the enforcement of a collective's original unity, I will argue that boundary setting, in response to challenges to the collective's spatio-temporal unity, includes boundary constitution and boundary enforcement. In order to safeguard itself, a collective has to assert its existence every time anew, both in the sense of its that-ness and its

⁵⁶² Schmitt, *On the Three Types*, 2004, p. 62.

what-ness, in response to that which challenges it. Collective self-assertion concerns the capacity of a collective to take account of and deal with challenges by reconfiguring its unity, rather than preserving what it deems to be its original unity.

3.6.1 Collective Self-Assertion

In Chapter 2 I have defined Schmitt's concept of security as collective self-preservation pointing to its roots in Spinoza's thinking. In Schmitt's view, a collective is endowed with an inner force to continue its existence, that is, it is a self-caused being whose existence can only be challenged by external causes. As a consequence, Schmitt understands contingency exclusively in the sense of the that-ness of collective existence. Either a collective exists in that it carries the cause of its existence within itself or it does not exist, lacking an inner cause. Now, on the basis of Hans Blumenberg's analysis of self-preservation as the principle of modern rationality, we could say that Schmitt's Spinozist interpretation represents a static interpretation of self-preservation, namely the conservation of an extant being.⁵⁶³ In order to reinterpret self-preservation in a dynamic sense, Blumenberg redefines self-preservation as self-assertion. According to Blumenberg,

[Self-assertion] means an existential program, according to which man posits his existence in a historical situation and indicates to himself how he is going to deal with the reality surrounding him and what use he will make of the possibilities that are open to him. In man's understanding of the world, and in the expectations, assessments, and significations that are bound up with that understanding, a fundamental change takes place, which represents not a summation of facts of experience but rather a summary of things taken for granted in advance, which in their turn determine the horizon of possible experiences and their interpretation and embody the "a priori" of the world's significance for man'.⁵⁶⁴

In fact, complementing Blumenberg's redefinition of self-preservation as self-assertion, Dieter Henrich highlights the reflexivity implied in self-preservation. 'Self-preservation implies and presupposes the structure of the self. Self-familiarity is linked to the experience that it is necessary to preserve one's own existence'.⁵⁶⁵ Henrich comes to a similar interpretation of self-preservation as Blumenberg.

'Self-conscious man finds himself in the paradoxical situation that he knows within his own existence certain conditions which necessarily escape his kind of cosmic knowledge. The result is that he can affirm his actuality only in the open arena of exploration and experiment of life. His aim is to create ever new situations for himself

⁵⁶³ For Blumenberg's genealogy of self-preservation as the principle modern rationality, see his 'Self-Preservation and Inertia', 1983.

⁵⁶⁴ Blumenberg, *The Legitimacy of Modernity*, 1983, p. 138.

⁵⁶⁵ Dieter Henrich, 'The Basic Structure of Modern Philosophy', *Cultural Hermeneutics*, vol. 2, 1974, pp. 1-18, especially p. 9.

and to try out all possible modes of existence. And in so doing he is not as much concerned with expanding his sense of power, but simultaneously, if not primarily, to validate his unintelligible existence over and over again. Since he does not know whence he came, he must consider everything he can do as also belonging to him in an intimate sense. Whenever he leaves something uninvestigated, he must think or fear to have that much less being'.⁵⁶⁶

So, whereas self-preservation defined in a static sense means maintaining the original condition of collective existence over time, self-assertion means safeguarding the continued existence of a collective by exploring the possibilities available to it for continuing its existence as the same and as a self. An important implication of the redefinition of collective self-preservation as collective self-assertion is that security should not only be considered in relation to the thatness of collective existence, as Schmitt does, but also to its what-ness. In other words, collective self-assertion implies the possibility of a collective to respond to that which challenges its existence by exploring other possibilities which might be available to it and thereby transforming what it is as unity. I return to this insight in a moment.

Key to the definition of security as collective self-assertion is the reflexive and therefore representational structure of collective subjectivity. For the representational structure of collective existence suggests that a collective exists as possibility; a representation is an actualization of its existence as a unity. The mode of being as possibility intimates that a collective has what Ricoeur would call a 'responsive' structure that relates to self-constancy, i.e. the mode of temporal permanence of identity as selfhood.⁵⁶⁷ The responsive structure of collective existence means that it has to establish each time anew what it is as a unity and whether it is a unity *in response to* that which questions its existence. Crucially, this responsive structure implies that a collective should *take account of* that which calls its existence into question. In fact, the need to take account of that which questions collective existence requires 'receptivity' from the side of the collective, to borrow Jean-Luc Nancy's felicitous expression.⁵⁶⁸ The notion of receptivity refers to the openness of a collective to its existence as possibility. That is, in order to safeguard its continued existence, a collective needs to be receptive to *possible* spatio-temporal unities that it can realize in the course of dealing with challenges to its existence. In order to safeguard its existence, a collective might consider a new representation, a new actualization of its existence as a spatio-temporal unity in response to what challenges it as a collective and what it is as a collective.

3.6.2 Boundary Setting

In a general sense, a collective can respond to that which challenges its existence by means of *boundary setting*, i.e. by setting the distinction between self and other than self, normal and ab-

⁵⁶⁶ Henrich, 'The Basic Structure of Modern Philosophy', 1974, pp. 14-15

⁵⁶⁷ Ricoeur, *Oneself as Another*, 1994, p. 165.

⁵⁶⁸ Jean-Luc Nancy, *The Inoperative Community*, 1991, pp. xxxvi-xli, especially p. xxxvi and p. xl. This preface only appeared in the English translation of *La communauté désœuvrée*.

normal and legal and illegal. Now, security as collective self-preservation boils down to boundary setting in the sense of mere boundary enforcement. Indeed, if collective existence is defined as an original whole of possibilities, then responding to abnormal behavior means reaffirming its original spatial and temporal closure. In other words, boundary setting as boundary enforcement means a reiteration of the distinction between the own and the strange, normal and abnormal and legality and illegality. In so far that the definition of collective security as collective self-assertion takes its cue from the representational structure of collective existence, boundary setting should however be parsed into *boundary enforcement* and *boundary constitution*.⁵⁶⁹ On the one hand, boundary setting cannot be reduced to boundary enforcement, as a collective lacks immediate access to the whole of possibilities that it comprises, possibilities that it includes and excludes. Yet, at the same time, boundary setting also cannot be reduced to boundary constitution. Despite the fact that boundary setting concerns the actualization of possibilities of collective existence that lie ahead of it, it always takes up again, to a greater or a lesser degree, the established distinction between the own and the strange, normal and abnormal and legality and illegality. So, the definition of collective security as collective self-assertion implies that boundary setting is always to a greater or a lesser degree *both* boundary enforcement and boundary constitution. In order to outline the definition of collective security as collective self-assertion, let me elaborate on the two modes of boundary setting.

Let me start with boundary setting as boundary enforcement. We could say that, to begin with, boundary enforcement is a response to abnormal behavior in that it affirms the collective as the ground of the distinction between legality and illegality. This means that to the extent that behavior intimates a spatio-temporal unity of collective existence that is not made available by the directing idea of an institution, the collective enforces its spatial and temporal boundaries in order to safeguard its continued existence. Boundary setting as boundary enforcement is generally understood as law enforcement, that is, the discovery, deterrence and punishment of behavior that forms a violation of legal order. The manifestation of boundary setting as boundary enforcement demonstrates receptivity in that it reaffirms the distinction between possibilities and impossibilities available by legal order. That is, boundary enforcement reaffirms the spatio-temporal unity of collective existence in the face of spatio-temporal unities intimated by abnormal acts or behavior, spatio-temporal unities that are deemed to be unavailable to the directing idea of an institution.

Boundary enforcement represents however a weak form of receptivity. If boundary enforcement is a response to behavior that is not available by the directing idea of an institution, boundary constitution is a response to behavior that challenges the spatio-temporal unity of collective existence, intimating a different actualization of the directing idea. This means that abnormal behavior that calls forth boundary constitution does not simply form a breach of legal order but challenges the distinction between the own and the strange, normal and abnormal and legal and illegal in an indirect way, calling into question the very ground of this distinction. In fact, we can distinguish between boundary constitution as a response to abnormal behavior that intimates a *possible* spatio-temporal configuration of collective existence that

⁵⁶⁹ Lindahl, 'Border Crossings by Immigrants', 2008, p. 129 ff. and *Fault Lines of Globalization*, p. 202.

is availed by the directing idea of an institution, and to those that intimate *another* directing idea and in that sense confronts the collective with an impossible possibility, i.e. a possibility whose actualization would amount to the destruction of collective existence.

In so far that boundary constitution is a response to behavior that intimates a possible spatio-temporal configuration of collective existence, it can be accommodated by collective existence by means of *transforming* its actual spatio-temporal unity. As a consequence, behavior that first seems to qualify as strange, abnormal or illegal is then included, hence appearing as a possibility enabled by legal order. By transforming the spatio-temporal unity of collective existence, boundary constitution is concerned with restoring the collective as the ground of legal order. That is, by transforming the distinction between legality and illegality, the collective authorizes the act as its own. This first form of boundary constitution demonstrates the receptiveness of a collective to its existence as possibility in that it demands a collective to be open to the possibility of being otherwise. Indeed, a collective can safeguard its continued existence by means of transforming *what* it is as a unity, dealing with what challenges its existence, i.e. the source of insecurity. The notion of 'dealing' with insecurity has two aspects. On the one hand, abnormal behavior loses its abnormal character since it is included as possibility, that is, it is actualized as a possibility available to collective existence. On the other hand, dealing with the source of insecurity also requires the collective to adapt itself to that which challenges its existence.

Boundary constitution can however take a more radical form than transformation. This concerns responses to abnormal behavior that intimate an impossible spatio-temporal unity of collective existence and in that sense another directing idea. To the extent that behavior intimates the negation of the directing idea of an institution, it cannot be dealt with by transforming the spatial and temporal boundaries of collective existence. For this would require the negation of the directing idea itself. In the face of abnormal behavior that intimates another directing idea, the collective cannot but respond *by persevering in a possible actualization of its spatio-temporal unity in order to safeguard its existence (as possibility) as such*.⁵⁷⁰ That is, to the extent that the inclusion of such abnormal behavior would boil down to the destruction of collective existence, it needs to be definitively excluded therefrom. Importantly, in such a situation the receptivity of a collective to its existence as possibility breaks down as the collective cannot authorize the abnormal behavior as its own possibilities in a definitive sense of the word. Indeed, strong manifestations of abnormality leave the collective no other option than to restore itself as the ground of legal order and hence to confirm the distinction between the own and the strange, normal and abnormal, legality and illegality. This means that an act or behavior that intimates another directing idea cannot but be qualified as strange, abnormal and illegal. As a consequence, in the case of strong abnormality, boundary constitution collapses into boundary enforcement.

⁵⁷⁰ For this definition of boundary constitution I draw here on Rudi Visker's analysis of the structure of subjectivity. See in particular Rudi Visker, 'Inleiding. Pluralisme en Transcendentie', in *Vreemd gaan en vreemd blijven. Filosofie van de multiculturaliteit*, SUN: Nijmegen, 2005, pp. 13-28.

3.6.3 Violence

A critical aspect of boundary setting is violence. In a general sense, we could say that, following Willem Schinkel's definition, violence is 'the reduction of being' of that which challenges collective existence.⁵⁷¹ According to Schinkel, '*violence is precisely that aspect of human interaction which consists of a reduction of being, of selection of ontological aspects and simultaneous non-selection of others.* Precisely because . . . a being is potentially many things . . . , any way of being necessarily means a reduction of being. The question of violence now hinges on the potential to realize potential, that is, on *the possibility of changing the aspect of the other*'.⁵⁷² Applying this definition of violence to collective existence, we have to discern between two aspects. First, violence targets and is hence primarily experienced by those who are deemed not to take up the first-person perspective of the collective in whose name it is exercised. Indeed, to the extent that these individuals, or groups, are deemed not to be taking part in the collective, the collective views them as a challenge to its existence. Second, to the extent that interpretation of challenges presupposes the first-person perspective of a collective, it is perforce reductive of the being of that which challenges it and in that sense irreducibly violent. Indeed, since a collective has a finite existence, it also has a finite and limited understanding of that which challenges its existence.

Normally, boundary setting appears as *legitimate coercion* and is considered as relatively unproblematic by the members of a collective. To the extent that boundary setting concerns the affirmation of the collective as the ground of legal order, it is held to have been authorized by the members of a collective. This authorization then presupposes that the reduction of being of that which challenges collective existence can be viewed as following from its directing idea. If boundary setting appears as legitimate coercion, it represents a case of what is generally called law enforcement. The snag is however that since collective existence has a retroactive structure, the authorization of an act of boundary setting by the members of a collective can only be ascertained retroactively. Therefore, even in the case of boundary enforcement, i.e. the default mode of responding to challenges, the authorization of boundary settings as legitimate coercion is *assumed* rather than that it can be presupposed. The fact that the manifestation of boundary setting as legitimate coercion is pending on the retroactive authorization by the members of a collective makes it a thorny issue. For it can never be established beforehand that what, for example, law enforcement authorities assume to be a case of legitimate coercion turns out to be one of violence.

It is here that the difference between Schmitt and me becomes manifest, again. For Schmitt the authorization of violence as legitimate coercion *presupposes* the existence of a collective as a unity 'that need not and cannot legitimate itself' to which acts of boundary setting can be attributed.⁵⁷³ To the extent that the existence of the collective as a unity has to be presupposed, in Schmitt's view, boundary setting always appears as legitimate coercion, and never as violence. In my view, however, an act of boundary setting has a performative structure; boundary setting is assumed or claimed to be in the name of a collective. This means that

⁵⁷¹ This definition of violence derives from Schinkel, *Aspects of Violence*, 2010.

⁵⁷² Schinkel, *Aspects of Violence*, 2010, p. 49, italics in original.

⁵⁷³ Schmitt, *Constitutional Theory*, 2008, p. 136.

in contrast to Schmitt boundary setting never stops needing legitimization. For the retroactive structure of collective existence leaves open the possibility that those who are subject to violence, i.e. whose being is reduced to how it is defined by the collective, represent a *possible* interpretation of the directing idea. It can never be foreclosed that boundary setting is effectively an act of violence rather than legitimate coercion.

To the extent that boundary setting implies a retroactive process of authorization, we could say that it is always to a greater or a lesser degree a wager, even in the case of what is generally understood as law enforcement. Boundary setting is irreducibly violent in that it perforce reduces the being of that which challenges collective existence, but also in that the violence is irreducibly groundless. There lurks the ever present possibility that boundary setting exercised to safeguard collective existence cannot be authorized by the collective as it views that which challenges its existence as a possible interpretation of the directing idea. This is to say that boundary setting can become itself a source of collective *insecurity*, triggering a collective to question its existence in the twofold sense of whether it exists as a unity and what it is as a unity. That is, boundary setting may cause the opposite of its intended effect, dislocating rather than safeguarding collective existence. For this reason it is necessary for a collective engaging in boundary setting to do so with a degree of self-restraint. Authorities can never take for granted that boundary setting is a form of legitimate coercion; they must always ponder the possibility that the opposite is the case.

To summarize, the reinterpretation of collective self-preservation as collective self-assertion implies that responses to insecurity can range between boundary enforcement and boundary constitution. It depends on the fact if a collective defines a challenge primarily in the sense of its that-ness or in the sense of its what-ness whether it engages in boundary setting as boundary enforcement or boundary constitution. This means that security has, conceptually speaking, two manifestations. It can take the shape of the enforcement and the transformation of the spatio-temporal unity of collective existence. To the extent that boundary setting is premised on the retroactive authorization process by a collective, boundary setting is always to a greater or a lesser degree a wager. In the case that the violence of boundary setting cannot be authorized retroactively by a collective, it loses its veil of legitimate coercion. In this respect, the aspect of violence suggests that boundary setting should be exercised prudently and with self-restraint.

3.7 Assessment: Continuities and Discontinuities with Schmitt

In this Chapter I have elaborated the concept of security as collective self-assertion. In so far that I have developed this concept of security in a critical encounter with Schmitt, it is inevitable that there is a certain continuity between his and mine. This continuity concerns the fact that collective security is an *existential* concept, i.e. a concept that relates to the existence of a collective. Indeed, I am on Schmitt's side when defending the view that security and insecurity are modes of being proper to collective existence. It is for this reason that I develop my concept of security as a critical redefinition of Schmitt's concept of security as collective self-

preservation. For what both the notions of collective self-preservation and collective self-assertion indicate is that the concept of security presupposes a collective subject, i.e. a 'self', that can be secure or insecure.

While I agree with Schmitt that security is an existential concept, and therefore can be predicated of collectives, my analysis of the contingency of collective existence argues that collective (in)security cannot be detached from individual (in)security. Whereas Schmitt has no difficulties in sacrificing individual security to collective security, the concept of collective action I have drawn on shows that while collective existence cannot be reduced to the aggregation of the individuals that compose it, a collective exists in and through the acts of the individuals that compose it, and whose interests and security are very much what is at stake in the very notion of action as *collective* action. Moreover, insofar as the unity of a collective is a represented unity, which cannot include without also excluding, a collective takes charge of its contingent origins by granting individuals a series of fundamental rights *against* the collective. Against Schmitt's reading of Article 48 of the Weimar constitution, I would say that measures oriented to securing the existence of the collective are only allowed to the extent that they protect a minimal core of fundamental rights. In other words, the interpretation of collective security in terms of self-assertion vigorously defends the liberal reading of Article 48 which Schmitt ruled out. This leads me to a position on the relation between collective and individual security that is different to those defended by Kelsen and Schmitt. Kelsen, as we saw earlier, collapses collective security into the security of an aggregate of individuals; Schmitt, to the contrary, sacrifices individual security to collective security. Security as collective self-assertion posits a strong correlation between collective and individual security.

To the extent that my concept of security draws on Schmitt's existential concept of security as collective self-preservation, I do so by adopting and critically reformulating the conceptual distinctions between ownness and strangeness, normality and abnormality, and friend and enemy. The understanding of collective identity in terms of the interrelated modes of sameness and selfhood implies that a collective exists as a process of collective self-(re)identification. Whether a collective is a unity and what it is as a unity is the outcome of a process of collective self-(re)identification, and not immediately clear in advance. As a consequence, there is no immediate and original criterion to distinguish between the own and the strange, the normal and the abnormal, and friend and enemy. These distinctions are subject to a recursive process of collective self-(re)identification and therefore need to be established every time anew. This relates to what I discussed in terms of the irreducible indeterminacy of notions like strangeness, abnormality and enmity.

There is yet another discontinuity between Schmitt's concept of security and mine that relates to my analysis of collective identity in terms of the interrelated modes of sameness and selfhood. Whereas Schmitt understands collective identity merely in terms of sameness, the notion of collective selfhood is crucial, I argued, in that it suggests that a collective exists as possibility, which I have analyzed on the basis of the representational structure of collective existence. Crucially, existence as possibility bespeaks a twofold understanding of contingency. To the extent that a collective exists as possibility it is contingent both as to what it is and that

it is a unity. Whereas Schmitt's reified understanding of collective identity leads him to interpret contingency reductively in the sense of contingency as that-ness, the reflexive understanding of collective identity that I have sought to develop entails that contingency as what-ness cannot be reduced to contingency as that-ness. That is, collective existence does not only have to take a stance, and in fact always already has taken a stance, to the possibility of non-existence but also to the possibility of being otherwise. Put differently, collective existence is not only finite but also transformable.

In fact, it is for this reason that I dismissed the notion of an existential threat preferring instead to speak of challenges. For whereas the notion of an existential threat relates to the reductive understanding of contingency as that-ness, the notion of a challenge captures the idea that the experience of collective insecurity can induce a collective to transform its spatio-temporal unity besides enforcing it. Indeed, to the extent that a collective needs to define how it perceives that which challenges its existence the possibilities available to a collective to safeguard its existence should not be understood in the limited sense of boundary enforcement but also includes boundary constitution. The response by a collective to that which challenges its existence can range from enforcing its actual spatio-temporal unity to transforming it, thereby seeking to safeguard its existence by accommodating the challenge.

This understanding of existential insecurity and the broadened notion of collective security that follows from it culminates in a redefinition of the exception, a concept that Schmitt takes to cover the notion of public order. In Schmitt's view, the exception requires a sovereign decision enforcing the distinction between legality and illegality as set by legal order, dismissing the behavior at stake as abnormal and hence illegal. In my interpretation, however, the exception should not necessarily lead to the enforcement of the distinction between legality and illegality but can also bring about a transformation of this distinction. For to the extent that the exception covers behavior that contests what counts as legal and illegal, it can lead a collective to reconsider how it has configured legal order. In this respect, cases of public order need not necessarily lead to a repressive response by way of boundary enforcement, but also includes the critical potential of boundary constitution, of being receptive to that which challenges collective existence.

Conclusion

The strong claim that I defend in this Chapter is that the concept of collective security is an existential notion, which means that security should be conceptualized from the first-person perspective of a collective. Collective existence has a reflexive structure to the extent that subjectivity deploys two poles of identity: as sameness and as selfhood. Identity as sameness and selfhood over time is constituted through representation. The reflexive and hence representational structure of collective existence implies that it is irreducibly insecure both as to whether it exists as a unity and what it is as a unity. Accordingly, the representational structure of collective identity is the root of *insecurity*. Nevertheless, the representational structure of collective subjectivity also functions as the principle of *security* in the sense that it leaves open the possibility of another actualization of collective existence in response to that which challenges

it. It is in this sense that the particular existential configuration of collective subjectivity results in the concept of security as collective self-assertion. To the extent that a collective has to assert its existence every turn anew in response to that which challenges it, security responses can range from boundary enforcement to boundary transformation, that is, between enforcing and transforming the distinction between ownness and strangeness, normality and abnormality, and legality and illegality.

Chapter 4

A Politics of (In)security

4.1 Introduction

In Chapters 1, 2 and 3 I have sought to outline a critical conception of collective security. The central argument that I have pursued in my analysis of the conceptions of security as a technique of government, as collective self-preservation and collective self-assertion is that the concept of security presupposes the notion of collective subjectivity, for security and insecurity are predicated of subjects, both individual and collective, as part and parcel of their mode of being. In this sense, my search for a critical conception of collective security has resulted in an analysis of its deep structure; the notion of collective subjectivity is a fundamental building block of collective security. In this Chapter I will recapitulate the insights yielded by the previous Chapters and integrate them in a systematic way. I will do so in two ways. I will provide an assessment of conceptual ramifications of the three notions of collective security as developed heretofore. And I will apply the three conceptions of collective security to a case study. As concerns the conceptual ramifications, I will show, contrasting the discursive and Schmitt's existential conceptions, that they are both premised on a reductive understanding of collective subjectivity, which results in a reductive account of collective security. I will use the opposition between the discursive and Schmitt's existential conceptions to present my own existential conception of security as an alternative. I argue that my conception of security as collective self-assertion does not suffer from their deficiencies as it accounts for collective identity in terms of the interrelated notions of sameness and selfhood. Subsequently, I will apply the three conceptions of collective security to the case study of the border fences around the Spanish enclaves of Ceuta and Melilla, which are put in place to prevent illegal immigration. Whereas the conceptions of security as collective self-preservation and as a technique of government lead to, respectively, a politics of security and a politics of insecurity, my conception of security as collective self-assertion results in what I will call a politics of (in)security.⁵⁷⁴

⁵⁷⁴ This characterization of the three conceptions of security also allows me to make explicit that I engage with, albeit critically, Michael Dillon and Jef Huysmans as the titles of their books indicate, respectively, *Politics of Security* (Routledge: London, 1996) and *The Politics of Insecurity* (Routledge: London, 2007). Although I have much sympathy for both the projects of Dillon and Huysmans, I take a different direction. As concerns Dillon, my aim is less ambitious than his as he aims to draw a political philosophy inspired by the continental, (post-)phenomenological tradition

This Chapter consists of five sections. In section 4.2, I compare the discursive and Schmitt's existential conceptions of security, focusing on their shared assumption, to wit their understanding of the mode of being of collective subjectivity in terms of identity as sameness. Then, in section 4.3, I present my conception of security as collective self-assertion as an alternative to both the discursive and Schmitt's existential conceptions. In section 4.4, I will return to my discussion of security studies in Chapter 1 to see in what sense my analysis casts new light on its 'crisis'. Then, in section 4.5, I will turn to analyze the practical implications of the three conceptions of security, applying them to the border fences around Ceuta and Melilla.

4.2 Two Conceptions of Security: Discourse vs. Existence

In this section I will compare the discursive and Schmitt's existential conceptions of security, focusing on their understanding of the referent of security, i.e. the notion of collective subjectivity. As we will see, although these conceptions are different in many respects, at a deeper level they assume the same understanding of collective subjectivity in the sense of an original and static identity. Whereas Schmitt assumes that collective subjectivity has an original identity, thereby defending a reified account of collective identity as substantial similarity, the discursive conception takes issue with the understanding of collective identity as an original identity, analyzing it instead as a discursive unity. The problem with their respective definitions of collective subjectivity is that they approach collective identity primarily in the sense of sameness, thereby endorsing a reductive understanding of the temporal mode of being of collective subjectivity. As a consequence, both the discursive and Schmitt's existential conceptions of security are incapable of accounting for collective subjectivity as a reflexive self-relation, which is, I have argued in Chapter 3, pivotal to a proper understanding of the concept of collective security.

4.2.1 Existential Unity

When comparing the discursive and Schmitt's existential conceptions of security, we can discern some striking differences between them. A first point that makes visible the difference between these conceptions is their respective definition of political power. Whereas Schmitt focuses on the problem of sovereignty as a form of power that is irreducible to legal power, Foucault on the other hand collapses sovereignty into legal power and then goes on to distinguish legal power from governmental power, i.e. governmentality. A second point relates to their respective understandings of the object of power and, related to this, the appreciation of the spatial nature of power. For Schmitt, sovereignty and, for that matter, law are spatial forms of power, conceiving concrete order as a spatial unity, that is, as an emplaced unity. Foucault on the other hand claims that governmentality concerns the exercise of power over a population to which the notion of a territory, and in that sense a spatial closure, does not seem to be an essential feature. Another difference concerns the notion of normality. Whereas Schmitt

on the basis of which he critiques security studies. As concerns Huysmans, he focuses too unilaterally, in my opinion, on the problem of insecurity, therefore discounting the critical potential of security.

defines normality substantially as normal order, comprising the notion of the normal situation and the normal type of man, Foucault and the representatives of the Foucaultian approach understand normality as a construction. Furthermore, and specifically relating to the notion of security, whereas, in Schmitt's view, sovereignty aims to preserve the subject/object of power, Foucault on the other hand suggests that security mechanisms are aimed at the expansion of governmental power.

However, the most fundamental difference between these two conceptions relates, I believe, to the perspective that they adopt with regard to the referent of security. Whereas Schmitt provides an account of the security referent from the suprapersonal perspective of a collective, that is, from the perspective of a collective as an *existential unity*, Foucault and the representatives of the Foucaultian approach take their cue from what Deleuze calls the 'third person' perspective of the collective as a *discursive unity*.⁵⁷⁵ Indeed, this is, in my view, the most fundamental difference between the discursive and Schmitt's existential conceptions: the perspectives of a collective in first-person and third-person. As we will see, despite their different accounts of collective subjectivity, both conceptions have the same deficiency. Because they define collective subjectivity predominantly in the sense of identity as sameness, and share a reductive understanding of its temporal mode of being; they collapse security into the problem of existence/non-existence of collective subjectivity, leaving little space for understanding security as the transformation of a collective in response to challenges to what it is as a unity.

Let me start with the definition of collective subjectivity as an existential unity, i.e. the understanding of collective subjectivity presupposed by Schmitt's existential conception of security. In Chapter 2 I have demonstrated that Schmitt's originalism leads him to define collective subjectivity in the reified sense of substantial similarity. This means that, in Schmitt's view, the notion of existence pertaining to collective subjectivity is identity as sameness. To the extent that Schmitt's originalist understanding of collective subjectivity implies a reification of what a collective is as a unity, the problem of security is rendered as the problem of existence/non-existence of collective subjectivity. Indeed, following from his reductive understanding of the contingency of collective subjectivity, Schmitt collapses threats to *what* a collective is as a unity (contingency as what-ness) into threats to *that* a collective exists as a unity (contingency as that-ness). In Schmitt's interpretation, security is the response to an existential threat. In fact, if, as Ricoeur argues, identity as sameness implies the model of temporal permanence as uninterrupted continuity, then sources of insecurity, whether in the form of the abnormal, the heterogeneous or the strange, can be defined as threats to continued existence in the sense of uninterrupted continuity of collective homogeneity. According to Schmitt, the response to existential threats is boundary enforcement. Schmitt's existential conception of security as collective self-preservation means enforcing the original unity of a collective subject. In other words, from Schmitt's originalist and reified conception of collective subjectivity

⁵⁷⁵ 'The subject is the product of phrases or dialectic and has the character of a first person with whom discourse begins, while the statement is an anonymous function which leaves a trace of subject only in the third person, as a derived function' (Deleuze, *Foucault*, 2006, p. 14).

follows an originalist interpretation of collective self-preservation, reducing boundary setting to boundary enforcement.

Although Schmitt defines collective subjectivity in an originalist and reified sense, thus disregarding its mode of being as selfhood, the latter does not completely escape his attention. Rather, as I argued in Chapter 3, the notion of selfhood remains implicit in Schmitt's conception of collective subjectivity. I explained that this relates to Schmitt's reductive interpretation of the notion of an institution. For whereas, in my interpretation, the directing idea of an institution features as the principle of a *representational* self-relation of a collective, Schmitt's originalist understanding of collective subjectivity leads him to interpret collective self-relation as an *immediate* self-relation. As a consequence, for Schmitt it is immediately and directly accessible to the members of a collective what they are as a unity.

4.2.2 Discursive Unity

Whereas Schmitt can be interpreted as assuming the notion of collective selfhood, albeit implicitly, this seems to be completely lacking in the discursive conception. The discursive conception completely disregards collective self-relation. Indeed, whereas Schmitt can conceptualize collective subjectivity as an instance that can be secure or insecure, even though in a highly problematic way, Foucault and the representatives of the Foucaultian approach can at best postulate, without explaining, collective subjectivity as such an instance.

The notion of collective subjectivity taken for granted by the discursive conception is polemically oriented against the understanding of identity as assumed by Schmitt. As I have argued in Chapter 1, the conception of security as a technique of government is essentially a critical conception in that it focuses on the performative dimension of security practices. According to the Foucaultian approach, practices of security produce and reiterate the insecurity of the security referent. This is to say that by proclaiming an issue to be a security problem, the security referent is constituted and reiterated as insecure. To be sure, the Foucaultian approach takes over the performative nature of security practices from the securitization theory, but the former also radicalizes the latter in that it focuses on the performative nature of the security referent. Interestingly, the Foucaultian approach develops this insight as concerns the performative nature of the security referent in discussion with Schmitt. To the extent that a collective is rendered as that which needs securing, the Foucaultian approach points out that security practices construe it as insecure; security practices construe collective identity as insecure. According to the Foucaultian approach, this is the essence of the political game: disseminating insecurity in view of establishing collective identity.

Analyzing Foucault's theory of governmentality, in Chapter 1 I further inquired into the ontological status of the collective, i.e. the population in Foucault's terminology, as a discursive unity. In Foucault's view, techniques of government construe a collective as an entity separate from the individuals who constitute it. Indeed, what Foucault attempts to show is that the construction of a collective is a prerequisite of political subjection of the individuals who are construed as a collective. In Foucault's view, however, the manifold of individuals

represent a realm of faceless potentiality that is given a particular shape through its objectivization by a discourse. This means that discourse actualizes the pre-discursive potentiality of the manifold of individuals in a particular way; it represents a possible actualization among others. This implies, first of all, that the collective as a discursive unity does not have existence independent from discourse. The pre-discursive potentiality can only be known in the way that it is actualized by discourse, retrospectively. Discursive identity has no presence, no permanence outside of discourse. Indeed, this is the aim of Foucault's discourse analysis: to unmask the reified existence of things, that is, to realize their 'depresentification',⁵⁷⁶ viewing existence merely as a changing face of faceless potentiality. The second implication is that Foucault reduces identity to discursive identity, which he defines as sameness. Discourse renders a multitude of individuals as the *same* whereas they exist as mere potentiality; it renders the heterogeneous into a homogeneous whole. In sum, Foucault assumes a fundamental split between the actuality/homogeneity of discourse and the potentiality/heterogeneity of the pre-discursive.⁵⁷⁷

The stakes of Foucault's analysis of collective subjectivity as discursive unity, hence of collective identity as discursive identity, are to show that identity is a hypostatization that seeks to obscure the difference that threatens the sameness of a discursive unity. In this respect, Foucault's model of discursive identity implies an opposition between identity, which he interprets in the sense of sameness, and difference. That is, discursive identity has permanence in time only within discourse, permanence in the sense of a construed uninterrupted continuity. Outside of discourse it is meaningless to speak of identity. Outside of discourse there is only non-identity, i.e. difference. Foucault's account of identity as discursive identity, and of the opposition between identity and difference, is quite radical in that it posits something either to exist as a discursive unity, and therefore as having an identity, or not to exist as a discursive unity, and thus as unidentifiable potentiality. In this respect, Foucault's account of identity suggests that either something exists as a dependent effect of discourse or else it does not exist as an identity.

This is interesting but in some ways problematic insight. For in so far that the notion of identity as discursive identity forms an alternative to the hypostatization of identity as sameness, it seems to embrace the reductive understanding of contingency. Indeed, to the extent that discourse analysis is concerned with showing how something is considered to exist as an identity in the mode of sameness, it tends to focus only on contingency as that-ness, and not on contingency as what-ness. If discourse makes something exist as an (insecure) identity, then outside of discourse it cannot be said to exist as such. This point can be demonstrated with the notion of an existential threat. The Foucaultian approach adopts the notion of an existential threat from the traditional approach of security studies. But by taking over the notion of existential threat it assumes the idea that security is about the question of existence/non-ex-

⁵⁷⁶ Foucault, *The Archeology of Knowledge*, 1972, p. 47.

⁵⁷⁷ 'No sense of possibility or potentiality exists in the realm of statements. Everything in them is real and reality is manifestly present' (Deleuze, *Foucault*, 2006, p. 4).

istence of a collective, and thus about the experience of contingency as that-ness. In this regard, there is little difference between the discursive and Schmitt's existential conceptions of security. Of course, the difference with Schmitt's existential conception of security concerns the critical idea that there is no such thing as an original identity that can be enforced, as this identity is a dependent effect of security framing. But this does not do away with the fundamental convergence between the discursive and Schmitt's existential conceptions in that they both understand security in terms of existence/non-existence.

Now, what is problematic about the notion of discursive identity is that it does not account for the temporality of a collective self-relation or the self-reference of the security referent, something that is captured by the notion of identity as selfhood. To the extent that the discursive conception considers the collective merely as an object, i.e. the object of governmental power, the understanding of identity as discursive identity does not allow of accounting for the self-reference of the security referent. The interpretation of collective subjectivity as an object, i.e. in the mode of identity as sameness, has far reaching implications with respect to the concept of security. For without the experience of collective temporality, the collective's members cannot experience its continued existence.⁵⁷⁸ And to this extent it becomes meaningless to speak of (in)security, that is, to speak of the members of a collective as concerned with its continued existence. The reduction of the *existence* of collective subjectivity to a discursive unity, means emptying the concept of security of its content.

In sum, what my comparison between the discursive and Schmitt's existential conceptions of security reveals is that the way in which collective subjectivity is conceptualized is decisive for the notion of security. More particularly, I have attempted to show how the understanding of collective subjectivity as an existential unity and as a discursive unity informs the conceptions of security that follows from it. First, I established that both Schmitt's notion of existential unity and Foucault's understanding of discursive unity are premised on the same notion of identity, to wit identity as sameness. As a consequence, both conceptions of security are concerned with the problem of security in terms of the existence/non-existence of a collective subject. Secondly, I argued that Schmitt's and Foucault's account of collective subjectivity is reductive in that they disregard the notion of collective selfhood, which involves the experience of a collective's own temporality. As concerns the notion of discursive unity, it only makes sense to speak of temporal continuity *within* discourse, as a construed temporal continuity; the realm outside of discourse, i.e. the pre-discursive, is the realm of difference, potentiality and heterogeneity. Therefore, as a discursive unity, a collective cannot be considered to have a self-relation and hence an experience of its temporality. By emptying the concept of security of its content, it merely receives an instrumental meaning. As concerns Schmitt's notion of existential unity, he does address the issue of collective selfhood, albeit implicitly, as it posits the unity of collective subjectivity as an original and hence immediate unity. This means that the experience of the collective's temporality evaporates in the immediacy of an absolute

⁵⁷⁸ For this objection to the discursive conception I am drawing on Visker's critique of Foucault: 'A subject that . . . would be completely absorbed in something else of which it is only the dependent effect, would not suffer from that burden, for the simple reason that it would no longer be there to feel its weight' (Visker, *Truth and Singularity*, 1999, p. 3).

now. Hence, security is understood as the enforcement of collective subjectivity as manifest in the original moment of self-presence.

4.3 An Alternative Conception of Security

The analysis of the notion of collective subjectivity underlying the discursive and Schmitt's existential conceptions of security revealed that they both fail to adequately conceptualize the temporal mode of being of collective subjectivity, that is, collective subjectivity in the interrelated modes of identity as sameness and as selfhood over time. I dismissed the discursive conception as it completely reduces the mode of being of a collective to a construct, i.e. an object construed by governmental techniques. While Schmitt's existential conception does take its cue from a collective in the first-person perspective, he defines collective subjectivity in a reified way. In order to escape from the deficiencies of both conceptions, in this section I will elaborate an alternative conception of security on the basis of an account of collective subjectivity which draws on elements from both the discursive and Schmitt's existential conceptions. Redefining the existential unity of collective subjectivity as a reflexive unity in terms of the interrelated notions of identity as sameness and as selfhood, I interpret security as collective self-assertion. To the extent that the reflexive interpretation of the existential unity implies that collective subjectivity is contingent both as to what it is as a unity and that it is a unity, security responses are variable and receptive to that which challenges collective subjectivity, ranging between boundary enforcement and boundary constitution.

4.3.1 Collective Subjectivity and Self-Representation

In order to present my conception of security as collective self-assertion as an alternative to both the discursive and Schmitt's existential conceptions, I will start by analyzing in what sense my interpretation of collective subjectivity is conceptually more adequate than the ones assumed by Schmitt, Foucault and the representatives of the Foucaultian approach. Let me begin my alternative account with the main deficiency of Schmitt's analysis of collective subjectivity. Indeed, as I argued in Chapter 3, my account of the reflexive structure of collective subjectivity entails a radical transformation of Schmitt. For whereas Schmitt claims that collective subjectivity should be defined as an immediate self-relation, his account of the principle of representation opens up the possibility to conceptualize collective subjectivity as a reflexive self-relation. The interpretation of collective subjectivity as a reflexive self-relation permits us to distinguish between two experiences of contingency, namely, contingency as concerns what a collective is as a unity and that it exists as a unity.

Interestingly, while Schmitt presupposes a collective to exist as immediate self-identity he also argues that this condition is fictitious.⁵⁷⁹ Fictitious in the sense that a collective can never actually be immediately self-present as a unity. In Schmitt's view, even in the case of acclamation, i.e. the situation in which a multitude directly expresses its consent or disapproval,

⁵⁷⁹ Schmitt, *Constitutional Theory*, 2008, p. 215.

a situation that seems to most closely resemble a collective's immediate self-presence, the collective does not act as a whole but as a multitude.⁵⁸⁰ The difficulty concerning the mode of being of a collective as a unity with which Schmitt struggles has been clearly formulated by Waldenfels: a we cannot say 'we'.⁵⁸¹ It is here that representation comes into the picture. A collective can exist as a unity only through representation. Actually, the notion of representation is also central to Hauriou's definition of an institution. According to Hauriou, the realization of the directing idea requires representation. A collective can be conceived as an acting unity to the extent that there is a representative who acts 'in the name of' the collective as a whole.⁵⁸² In this sense we could say that the representative mediates the self-relation of a collective. This is more or less similar to Schmitt's understanding of the principle of representation. At bottom, however, Schmitt is negative about representation as a principle of political form because the mediation of a collective's self-relation implies a distortion of the immediate self-identity of a collective. The danger of the radical implementation of the principle of representation is, in Schmitt's view, that 'the subject of political unity, the people, is ignored and the state, which is never anything other than a people in the condition of political unity, loses its substance'.⁵⁸³

In my view, the representational structure of collective subjectivity defines the collective as deploying a reflexive self-relation, thus combining the idea of a mediated self-relation and a moderate version of an ontology of potentiality or possibility, as I define it, which underlies Foucault's analysis of discursive identity. First of all, we could say that representation allows understanding a collective as an acting unity in the sense that a representative claims to act in the name of the collective as a whole. Yet, this also means that representation makes the collective exist only as a *claimed* or putative unity. This claimed unity represents a possible actualization of collective existence. The reflexivity of the representational structure concerns the fact that the members of a collective can affirm or dismiss the representation as an actualization of their existence. That is, the members can either affirm the representation as their own or disown it. It is in this sense that a collective exists as a process of *self-identification*, and not in the static sense of immediate self-identity, as Schmitt has it. Moreover, to the extent that the representational structure of collective subjectivity means that it exists in the form of a claimed unity, representation establishes collective existence as a radically contingent unity. Radically contingent in that the representation is always a defeasible claim about what it is that constitutes the collective as a unity and that the collective exists as unity. By affirming or denouncing a representation of the collective, the members of a collective establish whether or not they exist as a unity and what it is that constitutes their unity. So, against Schmitt, representation is constitutive of collective subjectivity, and not only undermining thereof.

The reflexive, representational structure of collective subjectivity entails that contingency amounts to the experience that the actual spatio-temporal unity of a collective is merely a possible realization of its existence. The two-layered contingency of collective subjectivity,

⁵⁸⁰ Schmitt, *Constitutional Theory*, 2008, pp. 206-207.

⁵⁸¹ Waldenfels, *Verfremdung der Moderne*, 2001, p. 140.

⁵⁸² Hauriou, 'The Theory of the Institution', 1970, p. 105.

⁵⁸³ Schmitt, *Constitutional Theory*, 2008, p. 215.

both relating to its that-ness and its what-ness, can manifest itself fundamentally in two ways, namely in the sense of the possibilities of being otherwise and not-being. Therefore, firstly, the experience of contingency can disclose the possibility of being otherwise, yielding a transformation of the spatio-temporal unity of collective existence. In this respect, the experience of being otherwise can result in a different actualization of collective existence. Then, secondly, contingency of collective subjectivity can be experienced as the possibility of not-being, i.e. the fact that the collective subject could also not exist. Importantly, the possibility of not-being makes clear to the members of a collective that they cannot exist as a group without embracing a possible actualization of its existence as a spatio-temporal unity, even though this actualization is only one of many. For without some form of actuality the collective cannot be considered to exist at all. This means that whereas the experience of being otherwise points to the fact that a collective cannot be reduced to its actuality, hence is more than actuality, the experience of not-being relates to the idea that that collective existence cannot be abstracted from its actuality, hence is less than actuality.

Besides developing my alternative account of collective subjectivity as a radical transformation of Schmitt, I also take an important insight from Foucault. As Veyne notes, Foucault's analysis of discursive identity is based on an ontology of potentiality. According to Veyne, a discursive unity is the actualization of potentiality. Actually, Foucault's ontology of potentiality is quite radical as he assumes a chasm between the realm of potentiality and its actualization in the form of a discursive identity. In Foucault's interpretation, in the final analysis, the world exists as fluid potentiality. Discursive identity is but a temporary eruption, an instantaneous face that does not last and will be replaced with other actualizations. Importantly, Foucault's ontology of potentiality implies a particular temporality. To put it in terms of Foucault's theory of governmentality, the techniques of government establish the existence of a collective retrospectively, in the sense of 'a retrospective regrouping'.⁵⁸⁴ That is, prior to discourse it does not make sense to speak of identity at all. Before the appearance of discursive identity there was nothing but potentiality, i.e. difference or heterogeneity. This means that Foucault's ontology entails a critical account of identity, pointing to the problem of difference or discontinuity.

Notice however that Foucault's critique targets the notion of identity as it is constituted by discourse. This notion of identity is defined by Foucault as sameness. As consequence, Foucault fails to account for the interrelatedness of identity as sameness and as selfhood. In the case of Foucault we could at best say that selfhood refers to the experience of difference, that is, the experience that the identity received from discourse is merely actualized potentiality, an instantaneous face. This is different from Ricoeur's notion of selfhood. According to Ricoeur, if *idem*-identity enables to identify a collective as the same over time, *ipse*-identity relates to the re-identification of the collective as a self and thus concerns a collective's self-relation over time. Crucially, whereas identity as sameness excludes thinking discontinuity, identity as selfhood can accommodate this, at least to a certain extent.

⁵⁸⁴ Foucault, *The Archeology of Knowledge*, 1972, p. 31; also Veyne, 'Foucault Revolutionizes History', 1997, p. 170.

Foucault's understanding of selfhood as a mode of identity is rooted in his account of the distinction between potentiality and actuality. While I am close to Foucault's ontology of potentiality, I think it is too radical. I deem it positive that the ontology of potentiality or possibility permits thinking the discontinuity of identity in the sense that a discursive unity is but an actualization that can be up to reconsideration. Nevertheless, with respect to the relation between potentiality and actuality Foucault overemphasizes, in my view, one side of this distinction, to wit potentiality. In Foucault's interpretation, the fissure between actuality and potentiality seems to be conceived so radically that it almost appears that the latter can exist without the former; as if potentiality can be considered to exist completely on its own terms, without actualization, without a (determinate) form. In contrast to Foucault, I would rather say that potentiality and actuality have a representational structure. Potentiality can only be considered to exist to the extent that it has presence as actuality, i.e. to the extent that it is (in the process of) being actualized. This does not mean however that potentiality depends on the persistence of one particular actualization. On the contrary, the fact that potentiality requires actuality means only that it needs some form of actualization, i.e. some persistence as actualization. Furthermore, the fact that potentiality only exists as a process of actualization does not mean that an actualization is exhaustive of potentiality. Actually, this seems to be the whole point of an ontology of potentiality: potentiality cannot be reduced to its actuality nor abstracted from it.⁵⁸⁵ To relate this back to the distinction between identity as sameness and selfhood, we could say that potentiality implies that there is no original sameness and selfhood. Identification always takes shape as re-identification; an actualization of collective existence can only be perceived as such retroactively. That is, identity refers to a process of (re-)identification, a process that includes the possibility of difference.

Now, the representational structure of collective subjectivity is an attempt to carry forward Foucault's critical account of identity in another way, namely with regard to the specific temporality of collective existence. To the extent that collective subjectivity exists as a representation, that is, as a claim to unity, it has *retroactive* existence as a unity, rather than 'retrospective' existence as Foucault would have it. The representational and therefore retroactive structure of collective existence implies an indefinite deferral of self-presence. Representation means a structural lack of complete and immediate self-presence that cannot be overcome. This is however something different than saying that a collective has no self-presence at all, as implied by Foucault's analysis. Moreover, representation does not only rule out the immediate self-presence of a collective but also that the process of collective self-identification can culminate in complete and full self-presence in the future. Now, the fact that the representational structure of collective subjectivity excludes all forms of originalism also means that representation is never merely a case of enforcing the unity of a collective, i.e. re-presenting or explicating what it potentially already is, but always also to a greater or a lesser degree the constitution thereof.

The representational structure of collective subjectivity requires a transformation of the originalist account of a collective's spatial unity. On an originalist reading we should make

⁵⁸⁵ This formulation is borrowed from Visker, 'Inleiding. Pluralisme en Transcendentie', 2005, p. 26.

a distinction between, first, the constitution of the spatial unity of a collective and, second, the enforcement of this unity. We can find such an originalist account of a collective's spatiality in Schmitt's analysis of *nomos*. In Schmitt's interpretation, the constitutive act of land-taking, i.e. the original emplacement of a collective, precedes the subsequent acts of distribution and exploitation. The representational structure of collective existence upsets the clear-cut order between, first, the constitution and, second, the enforcement of the boundaries that demarcate the spatial unity of a collective. Rather, considering the retroactive existence of a collective, the order between boundary constitution and boundary enforcement is reversed. This means that boundary constitution cannot be collapsed into what we take to be a case of boundary enforcement. In other words, what appears to be a case of boundary enforcement is to a greater or lesser degree always also a matter of boundary constitution. Accordingly, the representational structure of collective subjectivity strongly complicates the picture of boundary politics as implied by an originalist account of spatial unity. In doing so, the representational structure of collective existence does justice to the idea espoused by the Foucaultian approach of security studies that techniques of government are constitutive of collective identity. Nevertheless, as I have previously noted, the problem of the Foucaultian approach is that it is too constructivist. For while the Foucaultian approach discloses the constitutive nature of identity we could say that it tends to reduce boundary setting to boundary constitution.

On the basis of my analysis of the representational structure of collective subjectivity I concluded that a collective is existentially insecure. This relates to the problem that collective subjectivity is marked by a irreducible groundlessness. To the extent that a collective can only be considered to exist retroactively through the representation of a unity to which there is no direct access, it lacks an indubitable ground on which it can rely, as this ground is indefinitely postponed. Representation only establishes a provisional grounding of collective existence. It is in this sense that we can speak of what I termed the an-archival condition of collective existence. If the representation fails, the collective subject is without arche, i.e. groundless. Consequently, the members of a collective can no longer identify themselves as a unity, hence falling apart and ceasing to exist as a collective. This is also why the most radical manifestation of collective insecurity is factual anarchy. From the perspective of the members of a collective, in a situation of anarchy the binding character of laws is cancelled out; the rules of normal order are no longer viewed as collectively shared rules and the very distinction between normality and abnormality breaks down. So, from a first-person plural perspective, the most fundamental experience of collective insecurity is the disintegration of order, i.e. the disintegration of collective existence as a spatio-temporal unity.

4.3.2 Boundary Enforcement and Boundary Constitution

Now that I have discussed my alternative account of collective subjectivity in some detail, let me turn to the concept of security. In fact, the existential insecurity of a collective has fundamental implications with regard to the notion of security available to it. First of all, it implies that we need to resist the idea that security means preserving the original condition of collective existence. Indeed, in the sense that a collective has insecure existence as a unity, Schmitt's

definition of security as collective self-preservation fails. Because there is no original unity, collective subjectivity cannot safeguard its existence by simply preserving this unity. Starting from the fundamental insecurity of collective existence I have developed a reinterpretation of collective self-preservation revolving around the receptivity of a collective to its existence as possibility. Following Blumenberg's analysis, I have termed my conception of security collective self-assertion. Blumenberg elaborates the reinterpretation of self-preservation as self-assertion on the level of an individual human being. In contrast to self-preservation, self-assertion 'means an existential program, according to which man posits his existence in a historical situation and indicates to himself how he is going to deal with the reality surrounding him and what use he will make of the possibilities that are open to him.'⁵⁸⁶ I have sought to apply Blumenberg's reinterpretation of self-preservation as self-assertion to collective existence. If collective self-preservation relates to the idea of maintaining the original existence of a collective, collective self-assertion means that a collective has to assert its existence every time anew in the face of that which challenges it, thus exploring possibilities available to the collective for continuing its existence as the same and as a self.

Key to the reinterpretation of collective self-preservation as collective self-assertion is the reflexivity of collective self-relation. This relates, first of all, to the basic idea that a reflexive self-relation is a precondition for the members of a collective to be concerned with their continued existence as a unity. This is at least the lesson that we can draw from the analysis of the notion of self-preservation by Dieter Henrich, which he has developed in dialogue with Blumenberg. 'Self-preservation implies and presupposes the structure of the self. Self-familiarity is linked to the experience that it is necessary to preserve one's own existence'.⁵⁸⁷ According to Henrich, the reflexivity implied in self-relation suggests that self-preservation should not be interpreted statically, as Schmitt does, but dynamically. So, whereas self-preservation statically defined means maintaining the original condition of collective existence over time, the dynamic definition of self-preservation or self-assertion relates to a being that seeks to safeguard its continued existence by affirming it over and over again, making use of all possibilities open to it including unexplored possibilities that lie hidden in its own being.

The dynamic definition of self-preservation or the redefinition of self-preservation as self-assertion recalls Foucault's distinction between self-preservation and self-assertion. According to Foucault, self-preservation as the maintenance of a pre-given order also includes the notion of self-assertion. In fact, Foucault emphasized that self-assertion related to the expansion of power, i.e. the increasing of the state's forces: 'if it is true that most of the theorists lay stress on the fact that *raison d'État* is what makes it possible to preserve the state – the word "*manutention*," preserving, maintaining, is used – they all add that as well as this . . . it is also necessary to increase or expand it'.⁵⁸⁸ Interestingly, this aspect of expansion is also present in Blumenberg's and Henrich's redefinition of self-preservation. Indeed, as Henrich states, a dynamic interpretation of self-preservation includes that man is 'concerned with *expanding* his

⁵⁸⁶ Blumenberg, 'Self-Preservation and Inertia', 1983, p. 138.

⁵⁸⁷ Henrich, 'The Basic Structure of Modern Philosophy', 1974, p. 9.

⁵⁸⁸ Foucault, *Security, Territory, Population*, 2007, p. 288, italics in original.

sense of power'.⁵⁸⁹ Yet, while Foucault draws on the same concepts, he interprets self-assertion differently than Blumenberg and Henrich. Whereas Foucault argues that self-assertion should be understood merely in the instrumental sense of expansion of power,⁵⁹⁰ Blumenberg and Henrich claim that self-assertion has an existential meaning.

Defined at the level of collective subjectivity, the reinterpretation of self-preservation as self-assertion implies that security has a *responsive* structure. Indeed, representation does not simply mean reiteration but also responsiveness. Responsiveness in the sense that a collective can be challenged to explore possible spatio-temporal unities available under its directing idea in dealing with abnormality, and which could safeguard its continued existence as the same and as a self. Yet, to the extent that a collective's existence as possibility implies that it has a finite mode of being, its responsiveness is also finite. There are, in other words, limited possibilities available to a collective subject to deal with that which challenges its existence. In this respect, security lays bare the limited capacity of a collective to deal with that which challenges its continued existence as the same and as a self. The responsive structure of security also means that it is always a wager. Security can be characterized as a wager in so far that the challenge to collective existence requires determining both *what* the collective is as a unity and *that* it is a unity, without there being any independent criteria that could ground the appropriateness of the collective's responses. This is an important finding as it suggests that security cannot be reduced to the all or nothing question of existence/non-existence. That is, security does not relate exclusively to contingency as that-ness but also to contingency as what-ness.⁵⁹¹

If we can define security as the response to that which forms a challenge to the continued existence of a collective, security takes place by way of boundary setting, both in the sense of enforcing and (re-)constituting the spatio-temporal unity of a collective. Indeed, the reflexive structure of collective subjectivity implies that boundary setting is always both boundary enforcement *and* boundary constitution. If boundary enforcement is the reaffirmation of the collective's spatio-temporal unity in the face of behavior that is not available to and thus impossible under the directing idea of an institution, boundary constitution is a response to behavior that actualizes a *possible* configuration of collective existence different from the collective's actual spatio-temporal unity. Hence, boundary constitution implies a transformation of a collective's spatio-temporal unity. In short, security as boundary setting involves an assessment of a range of responses that could safeguard the continued existence of a collective, ranging between pure boundary enforcement and pure boundary constitution.

The upshot of this analysis of boundary setting is that security rules out definitive solutions to deal with that which questions collective existence. Because a collective is existentially insecure, it always has to assess its chances in the struggle to continue its existence as the same and as a self. This means that security is never simply a matter of boundary enforcement

⁵⁸⁹ Henrich, 'The Basic Structure of Modern Philosophy', 1974, p. 14, emphasis added, MB.

⁵⁹⁰ 'The real problem of this new governmental rationality [i.e. governmentality, MB] is not therefore just the preservation of the state within a general order so much as the preservation of a relation of forces; it is the preservation, maintenance, or development of a dynamic of forces' (Foucault, *Security, Territory, Population*, 2007, p. 296).

⁵⁹¹ To the extent that Oudejans discusses the notion of insecurity in relation to that-ness of collective existence she reaffirms the understanding of security assumed by both security studies and Schmitt. See Oudejans, *Asylum*, 2011, pp. 168-171.

or boundary constitution. Crucially, the rejection of definitive solutions requires a certain degree of self-restraint in dealing with insecurity. Since there is never a golden solution, a collective will always have to ponder all possibilities available to it prudently, every time anew.

To summarize, in order to escape from the shortcomings of the discursive and Schmitt's existential conceptions of security, in this section I have outlined an alternative conception of security. Starting from the idea that the concept of collective security presupposes the notion of collective subjectivity, I first developed an alternative notion of collective subjectivity on the basis of the principle of representation. Representation allows thinking collective identity in a reflexive way, thus mitigating the criticism that can be raised against both the discursive and Schmitt's existential conceptions. I elaborated the reflexive structure of collective subjectivity combining a radicalized version of Schmitt's account of representation and a moderate version of ontology of potentiality as advocated by Foucault. This redefinition of collective subjectivity results in the interpretation of security as collective self-assertion. To the extent that a collective is receptive to challenges to its existence, security has a responsive structure. And because a collective has a finite mode of being, the notion of security available to a collective is limited; limited in the sense that boundary setting may undermine or even counteract the continued existence of collective subjectivity.

4.4 Back to Security Studies

In the previous section, I have elaborated the conception of security as collective self-assertion, starting from a reflexive interpretation of the existential unity of collective subjectivity. Collective self-assertion forms both an alternative to the too critical conception of security as a technique of government and the too static and hence conservative conception of security as collective self-preservation. Now, before I test the three concepts of security by applying them to a case study, let me first return to my discussion with security studies. For I do not only claim that the conception of security as collective self-assertion is an alternative to the discursive and Schmitt's existential conceptions, I also claim that my analysis provides insight into the crisis of security studies. What are the implications of my analysis of security with respect the conceptual framework of security studies? In what sense does it cast new light on the crisis of security studies?

4.4.1 Beyond Objectivism and Constructivism

A first issue that attracts our attention is of methodological nature and concerns the prevalent theoretical approaches adopted by security scholars. In Chapter 1 I discussed basically three approaches of security studies, namely structural realism, the securitization theory and the Foucaultian approach. The theoretical roots of security studies are marked by structural realism. I have summarized the structural realist conception of security in terms of the threat-referent object matrix. After the unsuccessful attempt to settle the crisis of security studies by means of 'widening' the threat-referent object matrix, a new theoretical approach was proposed taking its cue from a performative account of language: the securitization theory. The securitization theory analyses security as a speech act, i.e. a linguistic, self-referential reality.

Building on insights from critical security studies and radicalizing the securitization theory, a third theoretical approach was developed on the basis of Foucault's theory of governmentality. The Foucaultian approach defines security as a technique of government, focusing on institutional, technological and technocratic processes implied by security framing. What these three approaches reveal is that the conceptual framework of security studies is marked by the opposition between objectivism (structural realism) and constructivism (the securitization theory and the Foucaultian approach). In order to escape this dichotomy, I adopt a phenomenological approach.

Conceptualizing security in terms of the threat-referent object matrix, the traditional approach of security studies reduces security to a causal relation between stimuli and response, thus perceiving the response to threats by political units more or less as a reflex.⁵⁹² By studying the behavior of political units, it is possible to predict and thus anticipate their responses. This objectivist conception of security assumes the objective presence of threats, i.e. the fact that threats are objectively given. In this respect, the traditional approach takes up an external or observational point of view, and in that sense presupposes but does not explain the perspective of a collective 'grasped from the inside', that is, a perspective from which the behavior of a political unit 'appears as directed and gifted with an intention and meaning'.⁵⁹³ The objectivism of the traditional approach is problematic for at least two reasons. Firstly, it lacks critical awareness about the fact that threats are never simply pre-given in an objective way but are always, to a greater or a lesser degree, defined as threats from the perspective of a collective. This point, which I will turn to assess in a minute, has been well argued by critical security scholars. Secondly, there is no causal relation or one-to-one correspondence between threat and response as assumed by a stimuli-response model. That is, the threat does not pre-determine the response. This implies that there is always a range of responses possible to deal with a threat, and not just one.

Critiquing the objectivism of the traditional approach, security scholars have turned to constructivist theories. I have discussed two of these constructivist approaches, i.e. the Copenhagen School and the Foucaultian approach, both of which define security in terms of a process of securitization. These approaches draw attention to the performative dimension of security. The notion of securitization as it was first defined by the Copenhagen School concerns security as a speech act. A security speech act is a self-referential practice that can lift an issue to the level of an existential threat. This means that security naming has the potential of creating something that didn't exist before. Put differently, if understood in the sense of a linguistic practice, securitization refers basically to the production of insecurity, i.e. the production of threats. Redefining the notion of securitization, the Foucaultian draws attention to the fact the production of insecurity means reproducing it. That is, acts of securitization do not only produce security but also reiterate the insecure condition of the instance that needs

⁵⁹² For a profound analysis of the stimuli-response model in the context of human perception, see Maurice Merleau-Ponty, *The Structure of Behavior*, trans. Alden L. Fisher, Beacon Press: Boston, 1963 [1942] and *Phénoménologie de la perception*, Gallimard: Paris, 1945.

⁵⁹³ Merleau-Ponty, *The Structure of Behavior*, 1963, p. 7. Merleau-Ponty makes this argument in the context of the individual subject.

to be secured. Securitization refers to technological, institutional and technocratic processes that constitute what Huysmans calls ‘domains of (in)security’. Importantly, the notion of securitization, both in the way in which it is defined by the Copenhagen School and the Foucaultian approach, reduces insecurity to a construct lacking an objective basis.

My definition of security as collective self-assertion supports the notion of securitization as it also points to the performative dimension of (in)security. At the same time, it views the latter as too constructivist. While it is certainly true that the definition of insecurity entails performativity, it would be reductive to analyze threats as mere constructs. Actually, such a reductive interpretation would disregard the particular temporal structure of performativity. For it is not so much the case that an issue can only be viewed as security threat retrospectively, as Foucault would have it; as if there first was nothing and then suddenly through the process of securitization there emerges a security threat. Instead, the performativity of (in)security means that it has a retroactive structure. This is to say that the act or behavior that is defined as a threat effectively precedes this qualification, but paradoxically can only be said to be a threat after being qualified as such. Indeed, this is, in my view, the fundamental problem of the notion of securitization: the fact that there is no objective criterion does not mean that a threat is reducible to a construction. In my view, behavior is qualified retroactively as a security threat *by the response*. This means that the response co-constructs behavior as a security threat, and that security threats are marked by irreducible indeterminacy. The fact that behavior is defined as security threat only retroactively means that this qualification remains open to interpretation and hence contestation.

The different appreciation of the performativity implied by the definition of (in)security between the notion of securitization and my conception of security can be traced back to a difference between Foucault’s analysis of the distinction between potentiality and actuality and mine. Recall that Foucault assumes a fissure between potentiality and actuality. In Foucault’s view, a security practice construes faceless potentiality into a security threat. What initially didn’t exist, is, retrospectively, turned into something, i.e. a security threat. The fissure between potentiality and actuality as assumed by Foucault, however, disregards to a certain degree the relation *between* potentiality and actuality. It is not the case that there is first faceless potentiality that is perceived retrospectively as something. Rather, it is only through the qualification as a security threat that its existence as potentiality is being actualized. It is first through the response, through the actualization, that something can be perceived as a security threat; responses make it accessible to the collective subject. Indeed, this is the fundamental difference between the discursive and my existential conception of security: the retroactivity of responsiveness implies a temporal hiatus. It is not the case that there was first nothing which is then construed into something, retrospectively. Instead, the response anticipates that which demands qualification. This means, on the one hand, that that which precedes the response is not nothing and, on the other, that response entails only a representation – and in that sense a construction – of that which demands qualification. In this respect, my existential account of collective security provides a more adequate understanding insecurity and its framing than the radical constructivism of the Foucaultian approach.

4.4.2 Exceptionalism

A general characteristic of structural realism is its military understanding of security. Dealing with security in the domain of international relations, structural realism reduces security to the realm of 'high' politics, i.e. military interventions. Notwithstanding the fact that successive attempts have sought to change this military core of security studies, this feature still seems to define the 'intellectual coherence' of the discipline of security studies, to borrow Walt's formulation.⁵⁹⁴ Indeed, the attempt to 'widen' the threat-referent object matrix, seeking to 'broaden' the range of threats and 'deepen' the notion of the security referent, reiterates rather than breaks with the military core of structural realism. Interestingly, to the extent that the military focus implies an exceptionalist understanding of security, the same can be said about the securitization theory and the Foucaultian approach. For although the securitization theory and the Foucaultian approach shift the attention to the process of securitization, they remain tied to the notion of an existential threat, relating security to exceptional cases. The military bias of security studies has two important implications. The first implication is that the narrow focus on the exceptional obstructs analyzing what we could call the normal character of (in)security. The second implication relates to the notion of existential threat. By adopting the notion of existential threat from the traditional approach, the securitization theory and the Foucaultian approach also take over its narrow understanding in terms of the existence/non-existence of collective subjectivity, thereby discounting the critical potential of security.

Let me start with the first point, the one-sided focus of security scholars on the exceptional character of (in)security. In fact, the Foucaultian approach analyzes 'the jargon of exception'⁵⁹⁵ in order to disclose the constructivist nature of that which is rendered as an exceptional security threat. This focus on security as a process of exceptionalization makes that the securitization theory and the Foucaultian approach reject security, proposing a negative agenda of de-securitization. This seems to suggest that (in)security is perforce an exceptional category, and does not apply to the normal state of affairs. Yet a remark by Jef Huysmans suggests the opposite, when he speaks of 'normalizing insecurity'.⁵⁹⁶ Indeed, Huysman's remark suggests that insecurity is not only a category of exceptional politics but also applies to normal or 'everyday' politics. While I support this insight I think that the Foucaultian approach does not provide a sufficient conceptual grounding for understanding security as an issue of normal politics. More particularly, the problem seems to be that the Foucaultian approach lacks the conceptual means to come to terms with the distinction between the normal and the abnormal, or what it renders as the distinction between the normal and the exceptional. Indeed, taking a skeptical stance, the Foucaultian approach only develops a critique of the traditional understanding of security but does not elaborate the notion of normal insecurity. In this respect, I agree with the way in which Ian Loader and Neil Walker characterize the critical strands of security studies. According to Loader and Walker, these critical security scholars

⁵⁹⁴ Walt, 'The Renaissance of Security Studies', 1991, p. 213.

⁵⁹⁵ Jef Huysmans, 'The Jargon of Exception – On Schmitt, Agamben and the Absence of Political Society', *International Political Sociology*, no. 2, 2008, pp. 165-183.

⁵⁹⁶ Huysmans, *The Politics of Insecurity*, 2006, p. 158.

form 'a negative, oppositional force'.⁵⁹⁷ The exclusive focus on exceptional forms of (in)security implies that the Foucaultian approach is only preoccupied with what Loader and Walker call the 'uncivilizing' dimension of security.

The reason why the Foucaultian approach fails to come to terms, conceptually speaking, with the distinction between normality and exceptionality follows from its strong constructivism. As Foucault argues, normality is merely an 'interplay of differential normalities'⁵⁹⁸; it is a construct, a discursive formation brought about by techniques of government. As a consequence, in Foucault's view, there is no *original* normative criterion to distinguish between the normal and the exceptional. Take for example the profiling function of databases used for border control like the Schengen Information System and Eurodac.⁵⁹⁹ Databases like the Schengen Information System and Eurodac 'refine' the profiling of who belongs and thus can be defined as normal and who not and hence is qualified as exceptional, that is, as a security threat.⁶⁰⁰ In this sense, we could say that profiling by databases is itself constitutive of the distinction between normality and exceptionality, between the normal and the abnormal. However, while true as far as it goes, by dismissing the distinction between normal and exceptional as an original distinction and understanding it as a construct, the Foucaultian approach tends to dismiss the distinction between normality and exceptionality altogether. Instead, what we should say is that databases co-constitute the distinction between normal and exceptional and they are therefore not neutral, normatively speaking.

Telling in this regard is Huysman's argument that the 'idiom of exception' implies a neutralization or marginalization of the plane of the societal: 'the idiom of exception has been called a jargon precisely because it marginalizes, and in the more radical cases, erases the societal as a realm of multi-faceted, historically structured political mediations and mobilizations'. While I can agree with Huysmans that the exception marginalizes the societal, the crucial question is of course in what sense 'the plane of societal' provides a notion of normality. But this question remains unresolved by Huysmans. It can be found, though, in the notion of an institution, which represents normal order.⁶⁰¹ On the basis of the notion of an institution, I have sought to make explicit the relation between security and normal order, a relation that is assumed but not made explicit by security studies. In fact, it is in this sense that my conception of security can be read as a further elaboration of the definition of security as a 'thick public

⁵⁹⁷ Loader & Walker, *Civilizing Security*, 2007, p. 14.

⁵⁹⁸ Foucault, *Security, Territory, Population*, 2007, p. 63.

⁵⁹⁹ In this regard, see my article (co-authored by Frans Brom), 'Greedy Information Technology: The Digitalization of the European Migration Policy', *European Journal of Migration and Law*, vol. 12, no. 4, 2010, pp. 455-470. See also Huub Dijstelbloem & Albert Meijer (eds.), *De migratiemachine. De rol van technologie in het migratiebeleid*, Van Gennep: Amsterdam, 2009 and the English and revised version of this book *Migration and the New Technological Borders of Europe*, Palgrave Macmillan: Basingstoke, 2011.

⁶⁰⁰ Huysmans, *The Politics of Insecurity*, 2006, p. 92; Dennis Broeders, 'The New Digital Borders of Europe: EU Databases and the Surveillance of Irregular Migrants', *International Sociology*, vol. 22, no. 1, 2007, pp. 71-92 and 'Tracing, Identifying and Sorting: The Role of EU Migration Databases in the Internal Control on Irregular Migrants', in H. Fassmann, M. Haller & D. Lane (eds.), *Migration in Europe: Threat or Chance*, Edward Elgar: Cheltenham, 2009.

⁶⁰¹ On this point I disagree with Huysmans' reading of Schmitt. See Huysmans, 'The Jargon of Exception', 2008, pp. 167-171. Whereas Huysmans' claim that Schmitt 'eliminates the societal from the political' may perhaps hold for a decisionist reading of Schmitt, this is not the case when Schmitt is read as an institutionalist, a reading that I have set out in Chapter 2.

good' as developed by Loader and Walker. For what I have conceptualized as normal order concerns what the notion of a public good defines as 'an *axiomatic* element of lived social relations'.⁶⁰² Moreover, the notion of a public good expresses in a different way something that I have discussed under the heading of normal order, namely the internal correlation between individual and collective (in)security. Whereas the one-sided focus on the exception results in a juxtaposition of the individual and the collective level, implying that collective security necessarily means 'illiberal security',⁶⁰³ the notion of a public good aims to reestablish the relation between individual and collective security. The definition of security as a thick public good refers to

'the accomplishment of a stable condition grounded in the tacit confidence individuals have that their diverse and common legitimate expectations and their diverse and common loyalties as members of a political community are acknowledged in ways that afford them the material and symbolic resources required to manage, and feel relatively at ease, with the threats that are or may be present in their environment'.⁶⁰⁴

While Loader and Walker primarily account for security from the perspective of the individual, they argue that the collective dimension is irreducible to security. Indeed, they speak of '*common* legitimate expectations' and '*common* loyalties' that individuals have 'as members of a political community'. In other words, the concept of security presupposes some form of commonality and hence collectivity.

The reorientation of the conception of security, covering both normal and exceptional (in)security, shows that the understanding of security by security scholars is too narrow and covers only a part of its meaning. More problematic is however that security studies seem to lack a criterion to distinguish between normal and abnormal or exceptional (in)security. This lack turns (in)security into an indistinct and hence ubiquitous phenomenon and explains why security scholars have been incapable of providing an argument as to why some issues should be defined (for example, terrorism, societal distress, immigration) as security problems and others not (for example, environmental degradation). Moreover, without such a criterion it is impossible to distinguish between individual and collective security other than in a negative way; they appear as indistinct, and for that reason everything seems to be mixed up. While I agree with the discursive conception that there is no original distinction between the normal and the exceptional, the directing idea and the way it is represented in concrete cases nonetheless provides such a criterion, albeit in the sense of a virtual criterion. The notion of the directing idea provides the criterion of normality and hence also of abnormality or exceptionality. However, to the extent that the directing idea requires representation, we never have direct

⁶⁰² Loader & Walker, *Civilizing Security*, 2007, p. 167, italics in original.

⁶⁰³ Didier Bigo (ed.), *Illiberal Practices of Liberal Regimes: The (In)security Games*, L'Harmattan: Paris, 2006; Didier Bigo & Anastasia Tsoukala (eds.), *Terror, Insecurity and Liberty: Illiberal Practices of Liberal Regimes after 9/11*, Routledge: London, 2008.

⁶⁰⁴ Loader & Walker, *Civilizing Security*, 2007, p. 169.

access to it. The representational structure of collective subjectivity implies that drawing the distinction between normality and abnormality/exceptionality is always a matter of both enforcing and constituting it.

The focus on exceptionalism by security studies has, as mentioned, yet another implication that relates to the notion of an existential threat. For what is interesting is that all security scholars, whether they adopt the traditional or a critical approach, focus in their discussion of security on the notion of existential threat, whether affirmatively or negatively. Crucially, the notion of existential threat suggests that security concerns the problem of existence/non-existence. That is, an existential threat refers to a reductive understanding of the contingency of collective subjectivity, namely contingency as that-ness. In this respect, the notion of insecurity advocated by critical security scholars is at bottom no different from the one defended by Schmitt. Both critical security scholars and Schmitt collapse (in)security into the problem of the existence/non-existence of collective subjectivity. Indeed, notwithstanding their plea to place security threats in the framework of normal politics and hence 'de-exceptionalize' them, by adhering to the traditional security discourse in a negative way, critical security scholars remain bound to it and are unable to express what it means to 'normalize insecurity' in a positive way. Critical security scholars do not account for insecurity in a way other than the negative understanding of the problem of existence/non-existence.

By reducing the notion of an existential threat to the question whether or not the collective exists as a unity, the other meaning of contingency, i.e. contingency as what-ness, is neglected. If an existential threat is exclusively defined in relation to the that-ness of collective existence, we lose sight of the fact that an existential threat can also be experienced as a challenge to the what-ness of collective subject. Actually, it is for this reason that I prefer to speak of insecurity in terms of challenges rather than threats as the latter notion narrows down (in)security to the problem of existence/non-existence, hence to boundary enforcement. To the extent that there are two ways in which challenges can be perceived and qualified by a collective, i.e. as a challenge to the what-ness or that-ness of collective existence, the authorities always have to take a decision how to interpret them. It is this element that makes boundary-setting a wager. Now, the fact that boundary-setting is a wager implies that security need not fill critical security scholars solely with 'unease'.⁶⁰⁵ For security also includes the potential of transforming collective subjectivity. Indeed, to the extent that security comprises both boundary enforcement and boundary constitution, it includes both the conservative dimension of preservation and the critical potential of transformation.

The critical potential of security links to the reflexive mode of being of a collective. In this respect, my definition of security as collective self-assertion supports the central idea behind Loader's and Walker's definition of security as a thick public good. According to Loader and Walker, key to the definition of security as thick public good is the problem 'how and why social collectivities, given the inextricability of collective purpose and social sense of self and the centrality of the idea of common security in the forging of that inextricable link,

⁶⁰⁵ Huysmans, *The Politics of Insecurity*, 2006, p. xi.

*come to think of themselves and sustain thinking of themselves as social collectivities . . .*⁶⁰⁶ Actually, it is for this reason that Loader and Walker define security as a ‘constitutive’ public good:

‘This, then, is the sense in which we can talk of security . . . as a *constitutive* public good – one whose actualization or aspiration is so pivotal to the very purpose of community that at the level of self-identification it helps to construct and sustain our ‘we-feeling’- our very felt sense of ‘common publicness’.⁶⁰⁷

The conception of security as collective self-assertion takes its cue from the reflexivity of collective existence which is also central to the conception of security as a thick public good, that is, from the idea that security needs to be thought in the sense of ‘an ongoing investment’ and can therefore lead to the transformation of collective subjectivity.⁶⁰⁸ Indeed, this is how I understand what Loader and Walker call the ‘civilizing potential’ of security. Security includes the possibility of transformation and emancipation.

To summarize, my conception of security casts critical light on the crisis of security studies. First of all, it reveals that security studies are caught in a conceptual framework ranging between objectivism and strong constructivism. As a consequence, it is not possible on the basis of the conceptual framework of security studies to conceive security from the first-person perspective of a collective subject. This means that security scholars therefore have performed a reductive analysis of security. Secondly, security studies still bear the stamp that it was given by the traditional approach in that it continues to have an exceptionalist bias. The military understanding of security implies, first of all, a narrow focus on exceptional forms of (in)security, discounting the distinction between the normal and the exceptional. Secondly, it implies that security scholars necessarily understand security as a problem of existence/non-existence, thus disregarding the critical potential that it can induce for the transformation of collective subjectivity. Nevertheless, to the extent that the Foucaultian approach introduces security as an existential concept against which it is polemically oriented, it provides the opportunity to support a great part of its analysis concerning the constructivism of security problems and the shift from exceptional to normal politics, giving it a more firm conceptual grounding. Indeed, this is what I have sought to accomplish with the conception of security as collective self-assertion, namely, adopt the critical aspects of the Foucaultian approach within an existential conception of collective security.

4.5 Security and Immigration

In Chapters 1, 2, and 3, we have analyzed three concepts of collective security. The first concept is the one provided by security scholars who take their cue from Foucault’s theory of governmentality. They define security as a technique of government. The second concept is based on the political and legal theory of Carl Schmitt. Schmitt defines security as collective

⁶⁰⁶ Loader & Walker, *Civilizing Security*, 2007, p. 164, emphasis added, MB.

⁶⁰⁷ Loader & Walker, *Civilizing Security*, 2007, p. 164, italics in original.

⁶⁰⁸ Loader & Walker, *Civilizing Security*, 2007, p. 163.

self-preservation. The third concept is mine. I define security as collective self-assertion. I have developed this definition in a critical debate with Schmitt, aiming to incorporate the critical point put forward by the Foucaultian approach against Schmitt about the performative dimension of security. In this final section I wish to put the three concepts of security to the test applying them to the issue of immigration. The case on which I will focus concerns the border fences around the Spanish enclaves of Ceuta and Melilla, fences build to prevent illegal border crossing into Spain and the EU. This is not a random choice. Immigration is central to the analysis of security by scholars associated with the Foucaultian approach and also plays role in Schmitt's analysis of security when he discusses strategies to neutralize the strange. The central question of this section is the following. How to analyze the border crossing of illegal immigrants into the EU on the basis of the three conceptions of security (technique of government, collective self-preservation and collective self-assertion)?

4.5.1 Illegal Immigration and the Border Fences around Ceuta and Melilla

Before we can go over to discussing the question of the border fences as security measures, we first need to contextualize the issue of illegal immigration against the background of the EU as an Area of Freedom, Security and Justice. The Area of Freedom, Security and Justice (hereafter: AFSJ) is a fundamental policy objective of the EU that was adopted by the Treaty of Amsterdam. In Article 2 of the Treaty of Amsterdam, this objective is formulated as follows, a formulation that was retained in subsequent treaties in more or less the same words:

[‘The Union shall set itself the objective] to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime’.⁶⁰⁹

The significance of the adoption of the AFSJ as a fundamental policy objective can hardly be overstated as it has turned policies in the field of justice and home affairs into ‘a self-standing integration objective’⁶¹⁰ next to the internal market. Accordingly, the policies covered by the AFSJ can no longer simply be characterized as a compensatory measure for the abolishment of the internal borders between the Member States, but have become an objective of European integration themselves.

In Communication 459/98, the European Commission teases out an important implication of the AFSJ as a fundamental policy objective.

⁶⁰⁹ Consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 325, 24 December 2002. There is a slight difference in the formulation of this fundamental policy objective since the Treaty of Lisbon: ‘The Union shall offers its citizens an Area of Freedom, Security and Justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime’ (Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 115, 9 may 2008). For an analysis of the differences between previous and the current formulation, see Jörg Monar, ‘The Area of Freedom, Security and Justice’, in Armin von Bogdandy & Jürgen Bast (eds.), *Principles of European Constitutional Law*, Hart Publishing/Verlag CH Beck: Oxford/München, 2010, pp. 551-585, especially p. 554 ff.

⁶¹⁰ Monar, ‘The Area of Freedom, Security and Justice’, 2010, p. 555.

‘It is in the framework of the consolidation of an Area of Freedom, Security and Justice that the concept of public order appears as a common denominator in a society based on democracy and the rule of law. With the entry into force of the Amsterdam Treaty, this concept which has hitherto been determined principally by each individual Member State will also have to be assessed in terms of the new European area. Independently of the responsibilities of Member States for maintaining public order, we will gradually have to shape a "European public order" based on an assessment of shared fundamental interests.’⁶¹¹

Indeed, if the EU is established as an Area of Freedom, Security and Justice, then this would imply the possibility of raising an issue of ‘European public order’.⁶¹² As stated in the cited passage, a European public order is shaped ‘independently of the responsibilities of Member States for maintaining public order’ and thus does not replace them. In fact, Article 72 of the Treaty on the Functioning of the EU states that the objective to constitute the EU as an Area of Freedom, Security and Justice ‘shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security’.⁶¹³ Nevertheless, the problem remains the same either in the case of the EU or of the Member States, namely maintaining law and order. For example, as concerns the control of the EU’s external borders, the aim of border control concurs for both the Member State in question and the EU in the sense that the control of external borders is a primary means for ‘the maintenance of law and order and the safeguarding of internal security’, to repeat Article 72 of the Lisbon Treaty.

To the extent that the AFSJ demarcates the area in which citizens of Member States and legally resident third-country nationals enjoy the right to free movement, much emphasis is on the management of the external borders, including measures against what is called ‘illegal immigration’. The notion of illegal immigration refers to irregular forms of immigration that do not fulfill the legal conditions of entry and residence.⁶¹⁴ As it is stated in Article 79 of the Treaty on the Functioning of the European Union, section 1,

⁶¹¹ European Commission, Communication 459/98, ‘Towards an Area of Freedom, Security and Justice’, *Bulletin of the European Union*, 7/8, 1998, pp. 152-157, especially p. 156.

⁶¹² Sandra Lavenex & William Wallace, ‘Justice and Home Affairs: Towards a “European Public Order”?’ in Helen Wallace, William Wallace & Marck A. Pollack (eds.), *Policy-Making in the European Union*, Oxford University Press: Oxford, 2005, pp. 457-480; Christian Kaunert, ‘The Area of Freedom, Security and Justice: The Construction of a “European Public Order”’, *European Security*, vol. 14, no. 4, 2005, pp. 459-483. For a critical analysis the AFSJ focusing on its spatiality, see Patrick Twomey, ‘Constructing a Secure Space: The Area of Freedom, Security and Justice’, in David O’Keeffe & Patrick Twomey (eds.), *Legal Issues of the Amsterdam Treaty*, Hart Publishing: Oxford, 1999, pp. 351-374; Hans Lindahl, ‘Inside and Outside the EU’s “Area of Freedom, Security and Justice: Reflexive Identity and the Unity of Legal Space”, *Archiv für Rechts- und Sozialphilosophie*, vol. 90, no. 4, 2004, pp. 478-497; ‘Jus Includendi et Excludendi: Europe and the Borders of Freedom, Security and Justice’, *The King’s College Law Journal*, vol. 16, 2004, pp. 234-247; ‘Finding Place for Freedom, Security and Justice: The European Union’s Claim to Territorial Unity’, *Constitutionalism Web Papers No. 1*, 2004.

⁶¹³ Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 326, 26 October 2012.

⁶¹⁴ To the extent that irregular migration concerns all forms of migration that do not comply with the legal requirements of entry or residence, it is an intrinsically diffuse concept. Christal Morehouse and Michael Blomfield identify the following categories of irregular migration in the EU: (1) illegal entry, (2) entry using false documents, (3) entry

‘1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.’⁶¹⁵

In fact, a substantial part of the measures managing the migration flow relates to the issue of illegal immigration, as stated in Article 79, section 2.c:

‘2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:

...

(c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;

...’⁶¹⁶

Consequently, measures against illegal immigration form an integral part of the emergence of the EU as an Area of Freedom, Security and Justice. In this sense, illegal immigration can be qualified as an issue of European public order.

A case in point is the border fence around Spanish enclaves of Ceuta and Melilla. This is an interesting example because of its peculiar geography. Ceuta and Melilla are two cities that belong to a European country and are on the African mainland.⁶¹⁷ This means that Ceuta and Melilla are the only territories part of the EU that provide a land border between the EU and Africa.⁶¹⁸ Because of their particular geography Ceuta and Melilla form a ‘gateway’ for irregular immigrants, as Peter Gold notes.⁶¹⁹ ‘Surrounded by Morocco and with the African continent behind them, it is scarcely surprising that they [i.e. Ceuta and Melilla, MB] are very

using legal documents, but providing false information in those documents, (4) overstaying visa-free travel period or temporary residence permit, (5) loss of status because of nonrenewal of permit for failing to meet residence requirements or breaking conditions of residence, (6) being born into irregularity, (7) absconding during the asylum procedure or failing to leave a host state after a negative decision and (8) a state’s failure to enforce a return decision for legal or practical reasons (Christal Morehouse & Michael Blomfield, *Irregular Migration in Europe*, Migration Policy Institute: Washington DC, 2011, p. 4; see also Elspeth Guild, ‘Who is an irregular migrant?’, in: Barbara Bogusz et al. (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspective*, Brill Academic Publishers: Leiden, 2004, pp. 3-28; Franck Düvell (ed.), *Illegal Immigration in Europe. Beyond Control?*, Palgrave Macmillan: Basingstoke/New York, 2006).

⁶¹⁵ Treaty on the Functioning of the European Union, 2012/C 326.

⁶¹⁶ Treaty on the Functioning of the European Union, 2012/C 326.

⁶¹⁷ For reasons of completeness, we should add that although Ceuta and Melilla indeed are part of the EU, they nonetheless have the status within the Spanish Kingdom as *Ciudad Autónoma*.

⁶¹⁸ For an analysis of the geopolitical, functional and symbolic dimensions of the borders around Ceuta and Melilla, see Xavier Ferrer-Gallardo, ‘The Spanish-Moroccan border complex: Processes of geopolitical, functional and symbolic rebordering’, *Political Geography*, vol. 27, 2008, pp. 301-321.

⁶¹⁹ Peter Gold, ‘Immigration into the European Union via the Spanish enclaves of Ceuta and Melilla: A reflection of regional economic disparities’, *Mediterranean Politics*, vol. 4, no. 3, 1999, pp. 23-36, especially p. 24.

attractive as points of entry for would-be illegal immigrants to continental Europe'.⁶²⁰ Actually, according to Gold,

'there is well-established network organized from Morocco which facilitates the passage of illegal immigrants from several countries in west and central Africa via Cameroon and Senegal to Morocco or Algeria and thence to the North African ports. Some try to cross to Europe from Tangiers, Oujda and Nador, while others try to do so from Ceuta and Melilla. Most of those who make it to the Spanish enclaves do not have the money to pay for a boat crossing and so they seek asylum'.⁶²¹

This means that a part of the irregular immigrants who try to reach Ceuta and Melilla originates from sub-Saharan African countries. It is well known that these immigrants, too poor to pursue another route into Europe, hide in the forests on Moroccan territory near the borders of Ceuta and Melilla waiting for the moment to cross it, often in large groups in order to increase the chances of success.

One of the measures to control the borders around Ceuta and Melilla is the erection of a border fence. Indeed, in order to keep the irregular immigrants out, the border between Morocco and the Spanish enclaves has been transformed from a 'fairly permeable'⁶²² border into a militarized zone with six meter high parallel fences with barbwire and all kinds of technologies to detect immigrants who attempt to climb them. As critics claim, the transformation from open and permeable borders into watertight frontiers reflects the general change in perception of the function of the external borders, a change that is captured by the notion of 'Fortress Europe'.⁶²³ As Pietro Soddu argues, for example, at a certain moment

'the Spanish Government and the European Union decided to protect the cities' borders with a modern and sophisticated system which would prevent immigrants from entering, delimiting those imaginary boundaries between Europe and Africa which were never definitely marked in Ceuta and Melilla. Those borders which only appeared on military maps and tourist guides, that for various centuries had represented a place of interaction and exchange, those borders capable of coloring the social fabric of both cities, are today the defiant symbol of the divide between two worlds, and are evidence of police supervision of immigration, as well as being the most expressive demonstration of the concept of a Fortress Europe that only accepts capable, good and qualified immigrants into its territory'.⁶²⁴

⁶²⁰ Gold, 'Immigration into the European Union via the Spanish enclaves of Ceuta and Melilla', 1999, p. 24.

⁶²¹ Gold, 'Immigration into the European Union via the Spanish enclaves of Ceuta and Melilla', 1999, p. 26.

⁶²² Asociación Pro Derechos Humanos de Andalucía, *Human Rights on the Southern Border 2014*, 2014, p. 15 (http://www.apdha.org/media/FS2014_eng.pdf, accessed March 16, 2015).

⁶²³ As Henk van Houtum and Roos Pijpers argue, to the extent that the external border is closed for the unwanted but open for the (economic) wanted, the notion of 'Fortress Europe' is inaccurate. They propose to speak of the EU as a gated community instead. See Henk van Houtum and Roos Pijpers, 'The European Union as a Gated Community: The Two-faced Border and Immigration Regime of the EU', *Antipode*, vol. 39, no. 2, 2007, pp. 291-309.

⁶²⁴ Pietro Soddu, 'Ceuta and Melilla: Security, Human Rights and Frontier Control', *Panorma*, 2006, pp. 212-214, especially p. 212 (<http://www.iemed.org/anuari/2006/aarticles/aSoddu.pdf>, accessed March 24, 2015).

As a matter of fact, as documented in a report by the *Asociación Pro Derechos Humanos de Andalucía*, an organization based in Andalusia, Spain, that promotes human rights, the border control policies related to the fences between the Spanish enclaves and Morocco have caused a series of human rights violations.

Two of the events in which human rights violations occurred concern the response of Spanish and Moroccan authorities to the mass storming of the border fences of Ceuta and Melilla in August and October 2005, and a push-back operation by the same authorities to prevent immigrants from accessing Ceuta via a beachside, Playa el Tarajal, in February 2014.⁶²⁵ As to the first, the mass storming of the border fences in 2005, it has been ascertained that at least fourteen immigrants died and hundreds were injured because of police interventions. The report by the *Asociación Pro Derechos Humanos de Andalucía* provides a detailed list of incidents related to the 2005 events, concluding that ‘the law enforcement agencies used inappropriate methods, used excessive force, in many cases with cruelty, and were insufficiently prepared . . .’⁶²⁶ In the events of 2014, around two hundred immigrants were pushed into the sea by the Moroccan authorities, which attempted to prevent them from crossing the beach to Spain. When the immigrants were in the water, the Spanish authorities took over from their Moroccan colleagues, aiming to push back the immigrants to Morocco. Even though the Spanish authorities never took responsibility for the fatalities that ensued, and the information about the interventions is based on witness statements only, the report claims that it is ‘reasonable to assume that the use of anti-riot equipment was disproportionate to the “threat”, and there is little margin of doubt that the shooting and teargas were related to the tragic death by drowning of 15 people’.⁶²⁷

In the eyes of the *Asociación Pro Derechos Humanos de Andalucía*, the history of the border fences around Ceuta and Melilla demonstrates a tunnel vision. The Spanish authorities seem ‘incapable of thinking about any other form of migration management’ than in terms of ‘higher fences, fences more difficult to cross’.⁶²⁸ According to *Asociación Pro Derechos Humanos de Andalucía*, this is a dead-end street – literally.

‘In the final analysis, there is important symbolism embodied in the fences of Ceuta and Melilla. It is the stark illustration of the policies of Fortress Europe. Externalisation, Frontex, Eurosur . . . and walls. Walls of suffering and death. Walls of a European siege mentality, searching for illusory security. We can build walls on the borders, justifying them with the needs of security and, although they can never finally achieve their terrible purpose, we keep using them to justify ever more frontier technology . . .’⁶²⁹

⁶²⁵ For a report specifically on the Moroccan authorities in these and other events, see Human Rights Watch, *Abused and Expelled. Ill-Treatment of Sub-Saharan African Migrants in Morocco*, February 2014 (http://www.hrw.org/sites/default/files/reports/morocco0214_ForUpload_0.pdf, accessed on March 16, 2015).

⁶²⁶ ADPHA, *Human Rights on the Southern Border 2014*, 2014, p. 28.

⁶²⁷ ADPHA, *Human Rights on the Southern Border 2014*, 2014, p. 41.

⁶²⁸ ADPHA, *Human Rights on the Southern Border 2014*, 2014, p. 37.

⁶²⁹ ADPHA, *Human Rights on the Southern Border 2014*, 2014, p. 40.

Because of the fact that the ‘current migration policies, of war against immigrants, provide no solutions’, the *Asociación Pro Derechos Humanos de Andalucía* claims that ‘a profound change of logic is required’.⁶³⁰ In fact, the *Asociación Pro Derechos Humanos de Andalucía* presents action points based on respect for human rights to change the current external border regime. These action points reasonably speak to a more inclusive approach to immigrants, for example by applying broader family reunification criteria. But the claim of the *Asociación Pro Derechos Humanos de Andalucía* is more radical than this. ‘The first step of this logic is to accept that there are no shortcuts to scrupulous respect for Human Rights. There is not National Interest nor border control requirement that can justify the serious violations of Human Rights carried out by our Government [Spain, MB] or those of Morocco or the European Union’.⁶³¹

In sum, this brief discussion shows that in the case of Ceuta and Melilla the creation of an AFSJ goes hand in hand with the establishment of restrictive and repressive external border control regime, even at the cost of fatalities among immigrants. The crucial question is of course how to assess the border fence around Ceuta and Melilla as a security response to the problem of illegal immigration. More particularly, how to assess the border fences on the basis of the three conceptions of collective security (technique of government, collective self-preservation and collective self-assertion)?

4.5.2 Politics of Insecurity

In the following I will apply the three concepts of security to the case of border fences around Ceuta and Melilla in the following order. First I will discuss the way in which the Foucaultian approach to security studies would analyze it. As we will see, the analysis of border fences as a technique of government is close to the one outlined in the report by the *Asociación Pro Derechos Humanos de Andalucía*. Then, I will turn to analyze the case on the basis of Schmitt’s conception of security. The contrast with the analysis of the border fence as a technique of government is striking. For whereas the analysis of the border fence as a technique of government delivers an utterly critical approach, Schmitt’s concept of security on the other hand provides a justification of the border control regime adopted by Spain and the EU. Lastly, I will analyze the border fence around Ceuta and Melilla on the basis of my own concept of security, collective self-assertion. In contrast to the other two conceptions, the focus in my analysis is not exclusively on the individual immigrant but also on the larger economic and social dynamics involved, i.e. what Saskia Sassen calls ‘migration systems’.⁶³²

How to analyze the border fences around Ceuta and Melilla as a technique of government? In a general sense, an analysis of the fences on the basis of the definition of security as technique of government focuses on how immigration is framed as a security threat by Spain and the European Union. In the case of the border fences around Ceuta and Melilla, the immigrants are not primarily conceived in economic or human rights terms, respectively, as a

⁶³⁰ ADPHA, *Human Rights on the Southern Border 2014*, 2014, p. 57.

⁶³¹ ADPHA, *Human Rights on the Southern Border 2014*, 2014, p. 57.

⁶³² Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization*, Columbia University Press: New York, 2015, p. 88.

worker or an individual who enjoys human rights, but framed as a threat to the continued existence of Spain and the EU. That is, the sub-Saharan Africans who are waiting on Moroccan territory for their passage to Ceuta and Melilla are rendered as an existential threat. Security scholars like Didier Bigo and Jef Huysmans point to the particular dialectic or logic of security framing. In the eyes of security scholars, by framing the irregular immigrants as an existential threat, Spain and the EU constitute themselves as insecure communities. The border fence reiterates the insecure existence of Spain and the EU and also the fact that irregular immigrants are the cause thereof.

On the basis of Bigo and Huysmans we could say that the establishment of the EU as an Area of Freedom, Security and Justice implies the securitization of the internal market. In Bigo's view, the AFSJ is aimed at controlling rather than facilitating free movement of individuals.⁶³³ To the extent that the AFSJ lumps together different kinds of security issues, such as cross border crime, migration and terrorism, it marks a new stage in what Bigo calls the European 'security continuum'.⁶³⁴ According to Bigo, instead of marking a new stage in the realization of the EU as an area of free movement, the AFSJ primarily institutionalizes the EU as an internal security space. Indeed, as Huysmans notes, if the policies grouped under the AFSJ were first legitimated as 'flanking measures for the effective creation of the internal market'⁶³⁵, now the AFSJ has become an autonomous element in European integration. Questioning the 'spill-over' from the internal market into an internal security field, Huysmans claims that the adoption of the AFSJ as a fundamental policy objective of the EU is the result of 'a political act of securitization'.⁶³⁶ For, in Huysmans' view, the AFSJ implies a politics of insecurity in that it always '*frames a relation between security and freedom*'.⁶³⁷ To counter this development, Huysmans suggests de-securitizing the EU by challenging 'the dominant presence in security frameworks in the Area of Freedom, Security and Justice', shifting 'the practical realization of freedom away from the overwhelming role of security techniques'. Huysmans adds that

'such a move requires that freedom is paired to other political principles than security, that the practical realization of freedom is not mediated through the practical realization of freedom but through the practical realization of equality or justice for example. Such a re-pairing is a complex practice, as can be glanced from the construction of justice in the Area of Freedom, Security and Justice . . .'.⁶³⁸

Providing a critical angle, the concept of security as a technique of government leads to questioning the practice of the border fences around Ceuta and Melilla. Why is it that Spain and

⁶³³ Bigo, *Polices en réseaux*, 1996.

⁶³⁴ Didier Bigo, 'The European internal security field stakes an rivalry in a newly developing area of police intervention', in Malcolm Anderson & Monica den Boer (eds.), *Policing Across National Boundaries*, Pinter: London, 1994, pp. 161-173, especially p. 164. Also Bigo, 'Security and Immigration', 2002, p. 63.

⁶³⁵ Huysmans, *The Politics of Insecurity*, 2006, p. 102.

⁶³⁶ Huysmans, *The Politics of Insecurity*, 2006, p. 86.

⁶³⁷ Huysmans, *The Politics of Insecurity*, 2006, p. 103, italics in original.

⁶³⁸ Huysmans, *The Politics of Insecurity*, 2006, p. 104.

the EU define immigrants who climb the border fence as security threat and not, or at least not, primarily as persons who make a claim to participating in the internal market of the EU or persons who make a claim to legal protection following from 'the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'⁶³⁹ on which the EU is based? What legitimates treating irregular immigrants primarily as a security problem, as *illegal* immigrants, something that stands in conflict with respecting them as human rights holders? And, furthermore, what does the border fence tell us about the political identity of EU? The direction of Bigo's and Huysmans's answer to these questions is clear. If the EU truly aspires to realize itself as an Area of Freedom, Security and Justice, we should de-securitize it, meaning that when dealing with irregular immigration we need to take into account freedom and justice, and thus not respond to it as a mere issue of European public order, that is, not merely issue of boundary enforcement.

A strong point of the analysis of the border fences around Ceuta and Melilla, on the basis of the conception of security as technique of government, is the observation that the securitization of the EU implies that political questions as concerns the establishment of the EU as an AFSJ are elided, thereby narrowing down the responses available to the EU to deal with irregular immigration to mere boundary enforcement. What critical security scholars try to reveal is that a security response is not simply boundary enforcement but presupposes a choice to do so, a choice that could have been made differently. Critical security scholars suggest that the EU can and should come to view itself in a different light, indeed, not in terms of security but rather as a provider of justice and freedom. Indeed, in the eyes of Bigo and Huysmans, irregular immigration should be viewed as an issue of normal politics, and not of exceptional politics. Irregular immigrants should not be conceived of as a threat, but rather as an issue related to (economic) freedom and (global) justice, in response to which the EU could opt for a politics of inclusion rather than a politics of exclusion. Yet, notwithstanding the cogent critique of the Foucaultian approach, what is problematic about it is the understanding of the relation between security and normal politics. By understanding security in an exceptionalist sense, the Foucaultian approach seems to detach security from the realm of normal politics. The Foucaultian approach seems to lack the conceptual resources to establish in what sense the problem of security understood in the sense of the problem of inclusion/exclusion returns at the level of normal politics. In what is sense is the closure, i.e. the principle of inclusion and exclusion, as materialized by the border fences around Ceuta and Melilla, not only constitutive of security but also of justice and freedom? And, accordingly, how to account for the internal correlation between security, freedom, and justice? It seems that the Foucaultian approach cannot account for the border fences around Ceuta and Melilla as means of boundary setting other than in the negative sense of the production of insecurity and exclusion.

⁶³⁹ Treaty on the Functioning of the European Union, 2012/C 325, Article 2.

4.5.3 Politics of Security

In contrast to the conception of security as technique of government, Schmitt would endorse the current external border regime. For, to begin with, the notion of a European public order has a strong spatial connotation. That is, order is perforce bounded as it presupposes a closure between inside and outside. In this sense, the border fence around Ceuta and Melilla reflects the EU's spatial boundaries; it materializes the spatial unity of Spain and the European Union as a *nomos*. The border fence separates 'a pacified order from a quarrelsome disorder, a cosmos from chaos, a house from a non-house, an enclosure from the wilderness', as Schmitt puts it.⁶⁴⁰ More particularly, to the extent that the border fence is constitutive of the European Union as an Area of Freedom, Security and Justice, Schmitt views it primarily as a disjunction between inside and outside, and not as a conjunction, 'a place of interaction and exchange' as Pietro Soddu argues in his critique of 'Fortress Europe'.⁶⁴¹ This is to say that, in Schmitt's interpretation, the border fence is primarily a dividing line between inside and outside.⁶⁴²

For Schmitt the border fences around Ceuta and Melilla are a primary means of collective self-preservation of the EU. The border fences demarcate the distinction between the EU's own place and that which is strange to it, between what it deems normal and abnormal, and, in its most radical sense, between friend and enemy. As a security response, the border fences should be understood as an instance of boundary enforcement, that is, the enforcement of normal order. Recall that, in Schmitt's interpretation, normal order consists of two elements. The first element is the normal situation. The normal situation concerns behavior that is in conformity to what a collective deems normal and hence legal. In this sense, to the extent that the climbing of the border fences forms an infringement of the legal regulation for entry into and residence in the EU, these immigrants can be qualified as illegal. The second element of Schmitt's definition of normal order is the normal type of man. The idea of a normal type of man refers to the notion of a collective's 'substantial similarity'.⁶⁴³ This is to say that individuals are considered normal if they participate in the substantial similarity of a collective. An example of this can be found in the preamble of the Lisbon Treaty, which states that the European Union draws its 'inspiration from the cultural, religious and humanist inheritance of Europe'.⁶⁴⁴ Schmitt would argue that to the extent that the sub-Saharan African immigrants

⁶⁴⁰ Schmitt, *The Nomos of the Earth*, 2006, p. 52.

⁶⁴¹ Soddu, 'Ceuta and Melilla', 2006, p. 212.

⁶⁴² Although the fences are equipped with some technological novelties, they represent a case of traditional borders, that is, the border in the sense of spatial dividing line. Yet, the 'low' technological nature itself does not play into the hands of Schmitt. For in the case of 'high' technological examples such as immigration databases the problem remains the same, that is, both a fence and a database form the materialization of a dividing line between those who are included and those who are excluded. Actually, Schmitt himself seems to have a well-formed sense of the possibilities of technological development as illustrated with his foresight on the process of democratic decision making: 'It is fully conceivable that one day through ingenious discoveries, every single person, without leaving his apartment, could continuously express his opinions on political questions through an apparatus and that all these opinions would automatically be registered by a central office, where one would only need to read the off' (Schmitt, *Constitutional Theory*, 2008, p. 274).

⁶⁴³ Schmitt, *Constitutional Theory*, 2008, p. 259.

⁶⁴⁴ Treaty on the Functioning of the European Union, 2012/C 325, Preamble, recital 2. There are at least two reasons why this definition of what Schmitt would call the 'political substance' of the European Union is controversial. First of all, the absence of an explicit reference to the Judeo-Christian roots of Europe. This issue has caused a heated debate back in the days when the draft of the Constitutional Treaty was negotiated. The second reason why this

do not participate in this substantial similarity, they can be qualified as abnormal, other or strange, that is, as individuals that don't belong in the EU. And in so far that these immigrants do not belong in the EU, they represent an infringement of normal order that requires a response of boundary enforcement.

As outlined in Chapter 2, Schmitt distinguishes three responses to neutralize abnormal or 'strange elements'.⁶⁴⁵ First of all, the neutralization of abnormality or strangeness can be realized through assimilation and expulsion. The third method of neutralization discerned by Schmitt is the final option of a collective to deal with abnormality and strangeness. This method can be defined as the 'existential negation' or destruction of the abnormal or strange element.⁶⁴⁶ Indeed, as Schmitt formulates it, 'the friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing'.⁶⁴⁷

In contrast to the conception of security as technique of government, Schmitt would answer the question affirmatively whether the irregular immigrants who climb the border fences around Ceuta and Melilla should be understood as an existential threat to Spain and the EU. That is, to the extent that Schmitt defines the notion of public order substantially, for him irregular immigrants are a threat to the existence/non-existence (contingency as that-ness) to the EU's unity. Indeed, according to Schmitt, because the sub-Saharan Africans cannot be considered to participate in the substantial similarity of Spain and the EU, they present a strange element intruding into what Spanish and European citizens call their own. Put legally, in Schmitt's view, the climbing of the border fence by immigrants is an exceptional or borderline case that requires the EU 'determining definitively what constitutes public order';⁶⁴⁸ the mass storming of the border fences 'defies'⁶⁴⁹ the normal order. Accordingly, from a Schmittian point of view, the infringement of the Spanish and European public order by irregular immigrants should be neutralized, if not through expulsion then in the extreme situation through physical killing, even if this requires a suspension of the rule of law, that is, paradoxically a suspension of the rule of law to safeguard the European Union as an Area of Freedom, Security and Justice. Acts whereby immigrants who attempt to cross the border between Morocco and Spain are abandoned to their fate, with the perspective of near-certain death, as in the events of the mass storming of the fence in October 2005 and the push-back operation at Playa el Tarajal in February 2014, approximates this Schmittian scenario. In short, Schmitt would endorse the definition of irregular immigration as *illegal* immigration.

In contrast to the conception of security as technique of government, Schmitt argues for the positive significance of the border fence around Ceuta and Melilla. The border fence enforces the spatial boundaries of collective existence, that is, it reflects the original spatial boundaries constitutive of the EU. Nevertheless, to the extent that Schmitt analyzes the border

formulation is controversial concerns the reference to 'Europe'. To the extent that the European Union makes a claim to the continent of Europe, the question then is of course where its boundaries end, an issue that relates for example to the question whether or not Turkey should be granted membership of the European Union.

⁶⁴⁵ Schmitt, *Constitutional Theory*, 2008, p. 262, translation altered, MB

⁶⁴⁶ Schmitt, *The Concept of the Political*, 2007, p. 33.

⁶⁴⁷ Schmitt, *The Concept of the Political*, 2007, p. 33.

⁶⁴⁸ Schmitt, *Political Theology*, 1985, p. 6.

⁶⁴⁹ Schmitt, *Political Theology*, 1985, p. 13.

fence as an instance of boundary enforcement, he reduces the question of the contingency of collective existence to the that-ness of collective existence. This is fateful because Schmitt thereby limits the range of responses available to the EU in dealing with irregular immigration. Indeed, problematic about Schmitt's analysis is that he assumes a collective to exist in an original condition of security, meaning that insecurity comes into the picture only in second instance, derivatively. Schmitt's static account of the relation between security and insecurity disregards the dynamic of their intrinsic relation, something that Michael Dillon denotes as 'the radical ambivalence of (in)security'. According to Dillon, 'it is only because it is contoured by insecurity, and because in its turn it also insecures, that security can secure'.⁶⁵⁰ In other words, it is an illusion to assume, as Schmitt does, that the border fence around Ceuta and Melilla creates a condition of security freeing a collective from insecurity. Consequently, the concepts of security as a technique of government and as collective self-preservation have their weak and strong points. Whereas the former accounts for the constructivist dimension of insecurity but tends to disregard the positive significance of borders as a dividing line, the latter tends to reify the border line and treat insecurity in a derivative sense.

4.5.4 Politics of (In)security

Now that we have analyzed the border fence on the basis of the definition of security as a technique of government and as collective self-preservation, let us turn to collective self-assertion. In what sense does irregular immigration form a *challenge* to the EU, i.e. as a threat and an opportunity? Essential to this conception of security is that it takes into account the twofold contingency of collective existence. In contrast to the conception of security as technique of government and as collective self-preservation, the latter distinguishes between contingency as that-ness and as what-ness. This twofold account of contingency follows from the representational structure of collective subjectivity. To the extent that a collective exists in the sense of a claimed unity, it is irreducibly insecure both as to what it is as a unity and that it is a unity. While representation claims to reproduce the collective's unity it also always constitutes to a greater or lesser degree this unity, both in the sense that it is a unity and what it is as unity. This means that the notion of an existential threat includes two meanings and that the possibilities available to a collective to safeguard its continued existence are much broader than assumed by Schmitt. For what Schmitt calls an existential threat can interpreted both as a challenge to the what-ness and to that-ness of collective existence. For this reason I prefer to speak of challenges rather than threats. The notion of a challenge involves both a threat and a range of transformative possibilities that open up to a collective. To view security as collective self-assertion, rather than as collective self-preservation, is to acknowledge this ambiguous status of what confronts a collective with its contingency.

The responsive structure of security suggests that boundary enforcement is not the only possibility available to the EU to respond to that which challenges it. Nevertheless, this is not to deny that boundary enforcement is a possible response to the irregular immigrants who attempt to cross the border fences. Indeed, if the responsible authorities would not act,

⁶⁵⁰ Dillon, *Politics of Security*, 1996, p. 127.

and just let the irregular border crossing happen, then this would imply an infringement of the EU's effective normal order as reflected in the legal regulations of entry and residence. And a continuous infringement of normal order can be experienced as challenge to the EU's existence/non-existence in that it could form a threat to how the EU has actualized its directing idea.⁶⁵¹ Indeed, if considered from the perspective of individual violating the legal regulations of entry and residence into the EU, boundary enforcement represents a possible response.

But it would be reductive to interpret the climbing of the border fences around Ceuta and Melilla merely as a question of existence/non-existence, i.e. contingency as that-ness. The behavior of the irregular immigrants forms also a challenge to the what-ness of collective existence; the climbing of the border fences also forms a challenge to *what* the EU views as its unity. In the eyes of migrants Europe represents an economic wealthy part of the world where they hope to improve their living conditions. As Ricard Zapata-Barrero argues, 'immigration flows from Africa highlight that the EU has become an "imagined community" for those who do not belong'.⁶⁵² The normative claim made by the immigrants is that they want to be included in the internal market of the EU and have a share in the Union's economic wealth. This understanding of the behavior of irregular immigrants requires a shift in perspective. Indeed, according to Saskia Sassen, the climbing of the border fences should be understood on the background of 'larger geopolitical and transnational economic dynamics'⁶⁵³, and not merely as individual action that can be qualified as legal or illegal. Sassen is concerned with what we could call the problem of 'individualizing' irregular migration as a security problem, indeed, a move whereby the larger, macro-economic dynamics are concealed. This does not only count for the approach that I characterize as 'politics of security', but also holds for the critique of the current border regime of EU by the *Asociación Pro-Derechos Humanos de Andalucía* in so far that they claim that the Spanish authorities violate human rights. For also human rights individualize and hence draw the attention away from what Sassen calls the 'migration system'. The point that Sassen wants to make is that immigration is related to 'the current or past actions of receiving countries'.⁶⁵⁴ The receiving country should not be considered as passive and the immigrant as active. Instead, as Sassen argues, 'the international activities of the governments or firms of countries of receiving immigrants may have contributed to the formation of economic links with emigration countries, links that may invite the movement of people as well as capital'.⁶⁵⁵ These observations suggest that responding to irregular immigrants requires that we need to understand why they want to come to the EU in the first place.

⁶⁵¹ This point is more or less absent in Lindahl's analysis of the Area of Freedom, Security and Justice (Lindahl, *Border Crossings by Immigrants*, 2008 and *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice*, Hart Publishing: Oxford/Portland, 2009). Pointing to the normative challenge that the border crossing of immigrants presents to the European Union, i.e. the claim for another Europe, Lindahl does not deal with the 'effective' challenge that illegal immigrants represent. In this sense, Lindahl's analysis does not go far enough in analyzing the finitude of collective existence at a political-legal level.

⁶⁵² Ricard Zapata-Barrero, 'Political Discourses about Borders: On the Emergence of a European Political Community', in: Hans Lindahl (ed.), *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice*, Hart Publishing: Oxford/Portland, 2009, pp. 15-31.

⁶⁵³ Sassen, *Losing Control?*, 2015, p. 71.

⁶⁵⁴ Sassen, *Losing Control?*, 2015, p. 90.

⁶⁵⁵ Sassen, *Losing Control?*, 2015, p. 90.

What stake has the EU in the migration flow of sub-Saharan Africans? In what sense has the EU itself contributed to what it has come to view as a significant source of insecurity?

A thorough examination of this question goes beyond the scope of this research. Here I can develop only the contours of what I have in mind. It is a well-established fact that there are economic disparities between the EU and the countries on the African continent and that the effects of these disparities not only concern income but also issues related to human development like life expectancy and literacy.⁶⁵⁶ It is also well-known and widely accepted that the EU has actively contributed to these economic disparities, for example by means of its Common Agricultural Policy. At first sight the overall aims of the EU's Common Agricultural Policy are laudable: to increase agricultural productivity, ensure a fair standard of living for the agricultural community, stabilize markets, assure the availability of supplies, and ensure that supplies reach consumers at a reasonable price.⁶⁵⁷ A closer look reveals however that 'the policy epitomises the principle of *community preference*, whereby the internal EU market is protected in order to favour domestically produced goods at the expense of imports'.⁶⁵⁸ By means of a complex system of import tariffs, export subsidies and direct subsidies the Common Agricultural Policy isolates the European industries and markets from competition, preventing, among others, African countries from accessing the internal market on normal, liberal terms.⁶⁵⁹ A point in case is the Common Agricultural Policy related to the commodity of sugar. It is claimed that EU sugar policies effectively thwart the reduction of poverty in African countries.⁶⁶⁰ So, in short, we could say that the Common Agricultural Policy has contributed to the geopolitical and transnational economic dynamics that drive African immigrants to the EU.

The recognition of the dynamic between the African countries and the EU as an economic entity provides an occasion to reflect on what the EU is as a unity. Since the adoption of the AFSJ as a fundamental policy objective of the EU, the focus on matters of security and immigration has shifted more and more to the EU in the sense of a political entity, an entity comparable to national constitutional orders.⁶⁶¹ Crucially, this approach has predetermined the way in which the irregular border crossing of immigrants is perceived and what

⁶⁵⁶ Gold, 'Immigration into the European Union via the Spanish enclaves of Ceuta and Melilla', 1999, p. 27.

⁶⁵⁷ Treaty Establishing the European Economic Community, 22 March 1957, Article 39.

⁶⁵⁸ Richard Gibb, 'Developing countries and market access: the bitter-sweet taste of the European Union's sugar policy in southern Africa', *The Journal of Modern Africa Studies*, vol. 42, no. 4, 2004, pp. 563-588, especially p. 568, italics in original.

⁶⁵⁹ Gibb, 'Developing countries and market access', 2004; Brent Borrel & Lionel Hubbard, 'Global economic effects of the EU Common Agricultural Policy', *Economic Affairs*, vol. 20, no. 2, 2000, pp. 18-26. Of course, the EU has special trade agreements with some African countries. This should be taken into account in agricultural trade reform. For, as Gibb argues, the African countries that now have preferential access to the EU could become the new losers.

⁶⁶⁰ Oxfam International, 'Dumping on the world. How EU sugar policy hurt poor countries', *Oxfam Briefing Paper*, no. 61, March 2004 and 'A Sweeter Future? The potential for EU sugar reform to contribute to poverty reduction in southern Africa', *Oxfam Briefing Paper*, no. 70, November 2004. I am grateful to Casilda Zauraz for giving me some helpful literature references on EU sugar policies.

⁶⁶¹ Monar, 'The Area of Freedom, Security and Justice', 2010, p. 554 ff; Neil Walker (ed.), *Europe's Area of Freedom, Security and Justice*, Oxford University Press: Oxford, 2004; Stephen David Coutts, 'The Lisbon Treaty and the Area of Freedom, Security and Justice as an Area of Legal Integration', *Croatian Yearbook of European Law and Policy*, vol. 7, 2011, pp. 87-107; Alun Howard Gibbs, *Constitutional Life and the Europe's Area of Freedom, Security and Justice*, Ashgate: Farnham, 2011.

responses are available to deal with it. In fact, this focus on what we could call the constitutionalization of the EU, i.e. the shaping of the EU as full blown Area of Freedom, Security and Justice, means that responses based on the idea of migration systems in which the EU is entangled remain unexplored. Nevertheless, if it is true that immigration and economic dynamics are intertwined and that the functioning of the EU as an internal market can be discerned as a cause of the migration flow of African immigrants to the EU, these irregular migrants challenge the EU to reconsider what it is as a unity. More particularly, the problem of immigration could lead to a reinvention of the EU as economic entity that is part of the world market. This could mean for example that the legal regulation of entry and residence becomes dictated by the needs of the internal market, implying that the AFSJ would be, anew, conceived as a flanking measure of the internal market. Focusing on immigration in the AFSJ as an existential threat (contingency as that-ness) deflects the attention from the challenge raised by the immigrants to *what* the EU is as a unity, in particular to the commonality of the internal market and how the EU relates to the commonality of a global market for which it bears responsibility. Here again we see the notion of a challenge, rather than as an existential threat, as opening up a critical space in which security as collective self-assertion allows not only for boundary enforcement but also and even boundary constitution.

Two implications can be drawn from this analysis of the border fences around Ceuta and Melilla on the basis of the conception of security as collective self-assertion. The first implication is that the current response to irregular migration by the EU – ‘higher fences, fences more difficult to cross’, as the *Asociación Pro Derechos Humanos de Andalucía* puts it – reflects that the EU understands it as a challenge to its existence/non-existence. Indeed, the EU understands irregular migration as individual behavior that requires boundary enforcement, that is, as a factual challenge to the EU. In the light of the fatalities among immigrants related to events in 2005 and 2014 in Ceuta and Melilla, this gives rise to the question in what sense we still can speak of the EU as an Area of Freedom, Security and Justice based on ‘the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law’⁶⁶² if these principles are suspended, not incidentally but structurally, in the course of its realization. What this question suggests is that security responses, i.e. responses that are assumed to deal with insecurity, can themselves turn into sources of insecurity. To the individuals to whom these responses are directed, but also in the sense that security policies can trigger questioning what and who ‘we’ are as a collective, for example in the form of public disapproval of the external border regime. The second implication is that responses to irregular immigration need to take into account the ‘migration system’, as Sassen calls it, which forms the background for the individual’s behavior. That is, irregular migration also forms a normative challenge to the EU. When considering the macro-economic dimension of irregular immigration, this opens up the possibility to deal with it by means of boundary constitution. In fact, this would imply that we should accept rather than reject the notion of a ‘security continuum’, in the sense that immigration policy is on a continuum with the EU’s economic and external relations policy. In order to respond to irregular migration in a way that does not

⁶⁶² Treaty on the Functioning of the European Union, 2012/C 325, Preamble, recital 4.

individualize it or treat it merely as a human rights problem, economic and external relations policies are part and parcel of migration policy and should be treated as such if responding to irregular migration as a normative challenge.

All in all, the analysis of the border fence around Ceuta and Melilla on the basis of the definition of security as collective self-assertion provides insight into the different dimensions of irregular or illegal border crossing as a security problem. Importantly, the conception of security as collective self-assertion resists simple solutions to security problems but it does not imply avoiding to set the boundaries in the end. Taking into account the fundamental contingency of the collective's existence, it dismisses easy responses to insecurity as proposed by the conception of security as collective self-preservation. This is not to say however that security policies based on collective self-assertion can principally escape from engaging in boundary enforcement. But if such measures are adopted it is done with self-restraint, taking into account that securing *eo ipso* implies insecurity. So, collective self-assertion implies awareness about the fact that decisions about boundaries are unavoidable, both as concerns whether we are a collective and what we are as a collective. This is where collective self-assertion is at some distance from the conception of security as technique of government, a conception that mobilizes critical potential but keeps its hands clean. In short, the definition of security as collective self-assertion provides an alternative to both the conception of security as collective self-preservation and the conception of security as technique of government.

Let me briefly round off this section. The three concepts of security offer different approaches to the issue of irregular immigration. The conception of security as technique of government is critical of defining immigration as a security problem. On the basis of the other two conceptions, collective self-preservation and collective self-assertion, it is indeed possible to analyze irregular immigration as a security problem. Nevertheless, whereas the conception of security as collective self-preservation affirms the qualification of irregular immigration as illegal immigration outright, the conception of security as collective self-assertion includes a critical assessment of that which is initially conceived as the source of insecurity. Moreover, what my analysis of the case of the border fence around Ceuta and Melilla suggests is that there is a range of responses available instead of just one.

Conclusion

In this Chapter I have compared the conceptions of security as developed in Chapters 1, 2, and 3. First I have assessed their conceptual differences, focusing on the conceptualization of the security referent. Whereas Schmitt defines the existence of collective subjectivity reductively in the mode of sameness, I argued that Foucault can be read as an inversion of Schmitt reducing collective subjectivity to a discursive unity. In contrast to both Schmitt's and the Foucault's understanding of collective subjectivity, I have developed a notion of collective subjectivity that takes its cue from the interrelated notions of identity as sameness and as self-hood, and which is reflected in its representational structure. This alternative understanding of collective subjectivity allowed me to define security as boundary setting, both including

boundary enforcement and boundary constitution. After having assessed the conceptual ramifications of the three notions of security, I applied them to the case of the border fences around Ceuta and Melilla. I argued that my conception of security provides the most adequate understanding of the border fence as a security measure in the sense that it allows to discuss it both in terms of boundary enforcement and boundary constitution.

Conclusion

This book has been devoted to critically assessing the concept of collective security. For this purpose I have identified and analyzed the two prevalent conceptions of security, namely, what I termed the discursive and Schmitt's existential conceptions. Despite their differences, both the discursive and Schmitt's existential conception understand security in terms of the all or nothing question of existence/non-existence, either affirmatively or negatively. I have tried to track down the root of this understanding of security, which, I claimed, relates to the conceptualization of the security referent, i.e. the notion of collective subjectivity. In this respect, this book scrutinizes the deep structure of collective security; it provides an analysis of the conceptual building blocks of a critical notion of collective security. Having assessed both conceptions of collective security, I have sought to reorient its understanding and develop an alternative conception of security, releasing collective security from its exclusive focus on the problem of existence/non-existence. In this conclusion, I will first provide a summary of the argument of the book and end by formulating the answer to the central question of this thesis, i.e., how to define collective security critically, on the basis of a set of six propositions.

In Chapter 1, I started out with the discursive conception of security, examining the conceptual framework of security studies, a sub-discipline of international relations. While the discipline of security studies has collective security as its central topic, there seems to be little agreement among security scholars as concerns the definition of their subject of study. The traditional approach conceptualizes security in terms of the threat-referent object matrix, focusing on international politics and military threats. A wide range of security scholars claim that this model has become obsolete in the post-Cold War world in which all kinds of new security threats and actors appear on the stage. In order to refocus security studies, security scholars have sought to innovate the conceptual framework of the traditional approach. I have discussed four attempts seeking to reorient security studies, to wit the widening debate, the securitization theory, critical security studies and the Foucaultian approach. What these attempts reveal is that in order to overcome the shortcomings of the traditional approach, security scholars have turned to a constructivist account of security. This theoretical reorientation has resulted in a critical reconsideration of the threat-referent object matrix. Moreover, the discursive understanding of security not only implies that the threat is a construct, but also that the security referent is the dependent effect of security framing.

My analysis of the conceptual framework of security studies leads to an important insight. The conceptual framework of security studies is marked by a dichotomy between objectivism and constructivism. If security was theorized in objectivist terms, a critical reconsideration has taken the opposite direction, casting security in constructivist terms. In this sense, the discursive approach merely inverts the traditional approach. This dichotomy obstructs resolving the crisis of security studies, as it implies that security scholars lack the conceptual resources to account for the security referent as a subject, i.e. an instance that can be secure or insecure. Security scholars either understand the referent of security in the reified sense of an object (traditional approach) or they reduce it to a construct (Foucaultian approach). While my analysis leads to the conclusion that the theoretical framework of security studies is inadequate to conceptualize collective security, it also provides the key to the way out of the discipline's crisis. We need to conceptualize the security referent from the first-person perspective of a collective subject, and not merely from a third-person perspective, as Deleuze calls it, i.e. as a discursive unity.

I turn, in Chapter 2, to search for a conceptual framework that takes its cue from the first-person perspective of a collective subject. To this effect I examine Carl Schmitt's political and legal philosophy, the adversary of security scholars versed in the critical strand of security studies. Although Schmitt does not deal with it explicitly, his political and legal philosophy can be read as a thorough reflection on the problem of security. My interpretation of Schmitt revolves around the notion of concrete order. The concept of concrete order is polemically oriented towards the normativist notion of state as legal order, and accounts for the concrete existence of collective subjectivity. Schmitt develops the concept of concrete order by drawing, amongst others, on Hauriou's notion of an institution. Key to the notion of an institution is the directing idea. The directing idea functions as the unifying principle of collective subjectivity that defines a group as a unity engaged in a collective enterprise. Schmitt further elaborates the notion of an institution, defining it as normal order, which consists of two elements, to wit the normal situation and the normal type of man. The latter aspect implies that Schmitt has a reified account of collective subjectivity. To the extent that Schmitt interprets collective subjectivity in the reified sense of a substantial unity, he further analyzes concrete order as homogeneity. Schmitt also analyzes the spatiality of collective existence, defining concrete order as a *nomos*, that is, as an emplaced collective that constitutes itself as an inside over and against an outside. Conceptualizing collective subjectivity as a concrete order, Schmitt claims that it should be understood as an existential unity, even though, existence, in Schmitt's account, becomes a reified existence.

In contrast to the discursive conception, Schmitt's existential conception has the advantage of accounting for the security referent as an instance that can be secure or insecure. Nevertheless, because Schmitt's analysis starts from the assumption that a collective subject exists in an original condition of order, insecurity comes into the picture only in second instance. Insecurity, in Schmitt's view, comes from without and manifests itself institutionally as the abnormal, legally as the exception and politically as the heterogeneous, notions that can be traced back to the existential distinction between the own and the strange. I established that

the manifestations of insecurity can be traced back to the metaphysical notion of contingency. Schmitt however has a reductive interpretation of contingency in the sense that he understands it in terms of the problem of existence/non-existence, i.e. what I defined as contingency as that-ness. Referring to Spinoza's metaphysics, Schmitt defines security as collective self-preservation. Security, for Schmitt, is the response to strangeness, a response that preserves the original existence of the collective subject. Assuming that a collective exists as an original unity, Schmitt interprets collective self-preservation as synonymous to boundary enforcement. Indeed, for Schmitt boundary setting boils down to boundary enforcement, that is, the enforcement of the original boundary between inside and outside, normal and abnormal, the own and the strange, and friend and enemy.

In the third Chapter I pursued my analysis of security in the wake of Schmitt's line of thought. For, in my view, Schmitt provides a rich and profound conception of security, conceptualizing it from the first-person perspective of a collective. Yet, despite the richness of Schmitt's thought, I also identified a decisive problem, which relates to his account of collective subjectivity. Schmitt fails to adequately conceptualize the temporal mode of being of collective subjectivity. To the extent that Schmitt posits collective subjectivity as an original unity, he has a reductive understanding of its contingency. In order to remedy the weakness in Schmitt's conception of security, I proposed to define the existence of collective subjectivity in terms of possibility, building on the reflexivity implied in the notion of the 'self' of collective subjectivity. The definition of the existence of collective subjectivity as possibility permits us, first of all, to account for collective self-relation in a reflexive sense, i.e. the reflexive relation between the individual members and the collective as a whole. But, secondly, it also makes clear that collective subjectivity is irredeemably contingent, anticipating the possibilities of being otherwise and of not-being. Moreover, elaborating the temporal mode of being of collective subjectivity, I argued that the self-relation of a collective entails performativity in that it is staged by representation. The representational structure of collective subjectivity further specifies the contingency of collective subjectivity. Considering that collective subjectivity exists through representational acts, the collective subject is contingent in the twofold sense of a certain groundlessness of the claim that it exists as a unity (contingency as that-ness) and what it is as a unity (contingency as what-ness).

My transformation of the existential unity of collective subjectivity allowed me to develop the interpretation of security as collective self-assertion. Collective self-assertion amounts to the capacity of a collective subject to persevere in existence by responding to challenges by drawing on the range of possibilities which are open to it. This entails that the *transformation* of the collective as a unity, to accommodate challenges thereto, falls within the scope of security. Following from the reflexive mode of being of collective subjectivity, security has a responsive structure and entails receptivity to the possibilities available to collective subjectivity. In this sense, a security response is an assessment of that which challenges collective subjectivity, whether it should primarily be interpreted as a challenge to the that-ness or the what-ness of a collective subject's unity. This variable interpretation of security challenges

implies that collective self-assertion can basically take two forms. A collective subject can respond to challenges by enforcing and by transforming its unity. That is, security responses can range between boundary enforcement and boundary constitution. This marks a decisive shift with respect to Schmitt, for whom collective self-preservation can only mean boundary enforcement. The ambiguous character of security makes that it has the character of a wager, in that there is no independent criterion about the nature of the challenge that might be available to those who act on behalf of the collective subject. And to the extent that security responses are a wager, it requires self-restraint from the collective subject who engages in collective self-assertion.

In Chapter 4 I have compared the three conceptions of security as developed in Chapters 1, 2 and 3, to wit, security as a technique of government, as collective self-preservation and as collective self-assertion. I claimed that my conception of security as collective self-assertion is the most adequate from a conceptual point of view because it does not narrow down security to the problem of existence/non-existence and does not reduce security either to boundary enforcement or to boundary constitution. I related this back to the notion of collective subjectivity presupposed by the three conceptions of security. Security as collective self-assertion is based on a notion of collective subjectivity that escapes the alternatives of a purely discursive or an original unity. Applying the three conceptions of security, and returning to the example that I used in the Introduction to articulate the central question of this thesis, I analyzed in what sense irregular migration into the European Union can be approached as a security challenge. On the basis of the conception of security as a technique of government, the issue of irregular immigration is constructed into a security problem. Hence, the proper response is to de-securitize illegal immigration. The conception of security as collective self-preservation substantiates the definition of irregular immigration as illegal immigration, i.e. as a security threat, in the sense that it forms an infringement of normal order. The proper response to infringements of normal order is boundary enforcement. In contrast to security as a technique of government and as collective self-preservation, the conception of security as collective self-assertion acknowledges the ambiguity of the challenge raised by irregular immigration. To the extent that irregular immigration is interpreted in the sense of individual action, it can be defined as a challenge that cannot elude boundary enforcement. However, if irregular immigration is perceived from a macro-economic perspective, it should be defined as challenge demanding boundary constitution predominantly by resetting the boundary between the EU as an internal market and the wider world.

To conclude this book, we can formulate its main theses in six propositions:

- (1) The concept of collective security presupposes the notion of collective subjectivity.
- (2) The unity implied by the concept of collective subjectivity is always a represented unity.

- (3) As a represented unity, collective subjectivity is irredeemable contingent, in the sense that there is a residual groundlessness in the claim *that* it exists as a unity and *what* it is as a unity.
- (4) Security issues manifest themselves in the form of challenges to collective subjectivity in that they involve a threat and open up a range of collective possibilities to deal with them.
- (5) The identification of a security challenge requires that it be qualified as such, meaning that the security responses are co-constitutive of the security challenge.
- (6) Responses to security challenges can range between pure boundary enforcement and pure boundary constitution.

Bibliography

Books and articles

Adam, A., *Rekonstruktion des Politischen. Carl Schmitt und die Krise der Staatlichkeit 1912-1933*, VCH/Acta Victoria: Weinheim, 1992.

Agius, C., 'Social Constructivism', in A. Collins (ed.), *Contemporary Security Studies*. Oxford University Press: Oxford, 2010, pp. 49-68.

Arendt, H., *The Human Condition*, The University of Chicago Press: Chicago, 1958.

Ashely, R. K., 'The poverty of neorealism', *International Organization*, vol. 38, no. 2, 1984, pp. 225-286.

Baldwin, D. A., 'Security Studies and the End of Cold War', *World Politics*, vol. 48, no. 1, 1995, pp. 117-141.

Baldwin, D. A., 'The concept of security', *Review of International Studies*, vol. 23, 1997, pp. 5-26.

Besters, M. & F. W. A. Brom, "'Greedy Information Technology: The Digitalization of the European Migration Policy', *European Journal of Migration and Law*, vol. 12, no. 4, 2010, pp. 455-470.

Besters, M., 'Review: Mariano Croce & Andrea Salvatore, *The Legal Theory of Carl Schmitt*', Routledge: Abingdon, 2013', *Netherlands Journal of Legal Philosophy*, vol. 43, no. 1, 2014, pp. 87-90.

Bigo, D., 'The European internal security field stakes an rivalries in a newly developing area of police intervention', in M. Anderson & M. den Boer (eds.), *Policing Across National Boundaries*, Pinter: London, 1994, pp. 161-173.

Bigo, D., *Polices en réseaux. L'expérience européenne*. Presses de la Fondation Nationale des Sciences Politiques, 1996.

Bigo, D., 'When two become one: internal and external securitizations in Europe', in M. Kelstrup & M. C. Williams, *International Relations Theory and the Politics of European Integration. Power, Security and Community*. London/New York: Routledge, 2000, pp. 171-204.

Bigo, D., 'Security and Immigration: Toward a Critique of the Governmentality of Unease', *Alternatives*, vol. 27, 2002, pp. 63-92.

Bigo, D. (ed.), *Illiberal Practices of Liberal Regimes: The (In)security Games*, L'Harmattan: Paris, 2006.

Bigo, D. & A. Tsoukala (eds.), *Terror, Insecurity and Liberty: Illiberal Practices of Liberal Regimes after 9/11*, Routledge: London, 2008.

Blumenberg, H., 'Kontingenz', in K. Galling (ed.), *Die Religion in Geschichte und Gegenwart. Handwörterbuch für Theologie und Religionswissenschaft*, vol. III, J.C.B. Mohr: Tübingen, 1959, pp. 1793-1794.

Blumenberg, H., 'Self-Preservation and Inertia: On the Constitution of Modern Rationality', in D. E. Christensen *et. al.* (eds.), *Contemporary German Philosophy*, vol. 2, 1983, pp. 209-256.

Blumenberg, H., *The Legitimacy of the Modern Age*, trans. Robert M. Wallace, MIT Press: Cambridge/London, 1985.

Böckenförde, E.-W., 'The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory', in D. Dyzenhaus (ed.) *Law as Politics. Carl Schmitt's Critique of Liberalism*, Duke University Press: Durham/London, 1998, pp. 37-55.

Borrel, B., & L. Hubbard, 'Global economic effects of the EU Common Agricultural Policy', *Economic Affairs*, vol. 20, no. 2, 2000, pp. 18-26.

Broeders, D., 'The New Digital Borders of Europe: EU Databases and the Surveillance of Irregular Migrants', *International Sociology*, vol. 22, no. 1, 2007, pp. 71-92.

Broeders, D., 'Tracing, Identifying and Sorting: The Role of EU Migration Databases in the Internal Control on Irregular Migrants', in H. Fassmann, M. Haller & D. Lane (eds.), *Migration in Europe: Threat or Chance*, Edward Elgar: Cheltenham, 2009.

Bush, G. W., 'Address to the Nation on the September 11 Attacks', *Selected Speeches of George W. Bush 2001-2008*, pp. 57-58.

Bush, G. W., 'Address to the Joint Session of the 107th Congress', *Selected Speeches of George W. Bush 2001-2008*, pp. 65-73.

Buzan, B., *People, States and Fear. An Agenda for International Security Studies in the Post-Cold Era*, Lynne Rienner: Boulder, 1991.

Buzan, B., O. Waever & J. de Wilde, *Security. A New Framework For Analysis*. London: Lynne Rienner Publisher, 1998.

Canguilhem, G., *The Normal and the Pathological*, Zone Books: New York, 2007.

Chrysostalis, J., 'Reading Arendt 'Reading' Schmitt: Reading *Nomos* Otherwise?', in M. Drakopoulou (ed.), *Feminist Encounters with Legal Philosophy*, Routledge-Cavendish: London, 2013, pp. 158-184.

Coutts, S. D., 'The Lisbon Treaty and the Area of Freedom, Security and Justice as an Area of Legal Integration', *Croatian Yearbook of European Law and Policy*, vol. 7, 2011, pp. 87-107.

Crampton, J. W., 'Space, Territory, Geography', in C. Falzon, T. O'Leary & J. Sawicki (eds.), *A Companion to Foucault*, Blackwell Publishing: Oxford, 2013, pp. 384-399.

Croce, M., 'Does legal institutionalism rule out legal pluralism? Schmitt's institutional theory and the problem of concrete order', *Utrecht Law Review*, vol. 7, no. 2, 2011, pp. 42-59.

Croce, M. & A. Salvatore, 'Ethical Substance and the Coexistence of Normative Orders. Carl Schmitt, Santi Romano, and Critical Institutionalism', *Journal of Legal Pluralism & Unofficial Law*, nr. 56, 2007, pp. 1-32.

Croce, M. & A. Salvatore, *The Legal Theory of Carl Schmitt*, Routledge: Abingdon, 2013.

Dahrendorf, R., *Law and Order*. Stevens & Sons: London, 1985.

De Spinoza, B., *Ethics*, in: E. Curley (ed.), *The Collected Works of Spinoza (vol. 1)*, Princeton University Press: Princeton, 1988, pp. 408-617.

De Wilde, Marc, 'The state of emergency in the Weimarer Republic. Legal disputes over Article 48 of the Weimar Constitution', *Tijdschrift voor Rechtsgeschiedenis*, vol. 78, 2010, pp. 135-158.

De Wit, T. W. A., *De onontkoombaarheid van de politiek. De soevereine vijand in de politieke filosofie van Carl Schmitt*, Pomppers: Ubbergen 1992.

Deleuze, G., 'Postscript on the Societies of Control', *October*, vol. 59, 1992, pp. 3-7.

Deleuze, G., *Foucault*, Continuum: London/New York, 2006.

Derrida, J., 'Difference', in *Speech and Phenomena*, Northwestern University Press: Evanston, 1973, pp. 129-160.

Derrida, J., 'Speech and Phenomena: Introduction to the Problem of Signs in Husserl's Phenomenology', in *Speech and Phenomena*, Northwestern University Press: Evanston, 1973, pp. 1-104.

Dierse, U., 'Anarchie, Anarchismus', in J. Ritter, K. Gründer & G. Gabriel (eds.), *Historische Wörterbuch der Philosophie*, vol. I, Wissenschaftliche Buchgesellschaft: Darmstadt, 1971, pp. 267-294.

Dijstelbloem, H. & A. Meijer (eds.), *De migratiemachine. De rol van technologie in het migratiebeleid*, Van Gennep: Amsterdam, 2009.

Dijstelbloem, H. & A. Meijer (eds.), *Migration and the New Technological Borders of Europe*, Palgrave Macmillan: Basingstoke, 2011.

Dillon, M., *Politics of Security: Towards a Political Philosophy of Continental Thought*, Routledge: London, 1996.

Dubber, M. D., & M. Valverde (eds.), *The New Police Science. The Police Power in Domestic and International Governance*, Stanford University Press: Stanford, 2006.

Dusza, K., 'Max Weber's Conception of the State', *International Journal of Politics, Culture, and Society*, vol. 3, no. 1, 1989, pp. 71-105.

Düvell, F. (ed.), *Illegal Immigration in Europe. Beyond Control?*, Palgrave Macmillan: Basingstoke/New York, 2006.

Düvell, F., 'Irregular Migration: a Global, Historical and Economic Perspective', in: Franck Düvell (ed.), *Illegal Immigration in Europe. Beyond Control?*, Palgrave Macmillan: Basingstoke/New York, 2006, pp. 14-39.

Düvell, F., 'Framing and Reframing Irregular Immigration', in B. Anderson & M. Keith, *Migration: The COMPAS Anthology*, COMPAS: Oxford, 2014.

Dyzenhaus, D., *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Herman Heller in Weimar*, Oxford University Press: Oxford, 1999.

Ejdus, F., 'Dangerous Liaisons: Securitization Theory and Schmittian Legacy', *Western Balkans Security Observer*, no. 13, 2009, pp. 9-16.

Ferrer-Gallardo, X., 'The Spanish-Moroccan border complex: Processes of geopolitical, functional and symbolic rebordering', *Political Geography*, vol. 27, 2008, pp. 301-321.

Fiala, H., 'Politischer Dezisionismus', *Revue Internationale de la Theorie du Droit*, vol. 9, 1935, pp. 101-123.

Forde, S. 'International Realism and the Science of Politics: Thucydides, Machiavelli, and Neorealism', *International Studies Quarterly*, vol. 39, no. 2, pp. 141-160.

Foucault, M., *The Archeology of Knowledge*, trans. A.M. Sheridan Smith, Pantheon Books: New York, 1972.

Foucault, M., *The History of Sexuality. Volume I: An Introduction*, trans. Robert Hurley, Pantheon Books: New York, 1978.

Foucault, M., *Surveiller et punir: naissance de la prison*, Gallimard: Paris, 1975.

Foucault, M., 'Politics and the study of discourse', in G. Burchell, C. Gordon & P. Miller, *The Foucault Effect. Studies in Governmentality*, University of Chicago Press: Chicago, 1991, pp. 53-73.

Foucault, M., *The Order of Things. An Archeology of the Human Sciences*, Routledge: London/New York, 2005.

Foucault, M., *Security, Territory, Population. Lectures at the Collège de France 1977 – 1978*, Palgrave Macmillan: Basingstoke, 2007.

Foucault, M., *The Birth of Biopolitics. Lectures at the Collège de France 1978 – 1979*, Palgrave Macmillan: Basingstoke, 2008.

Garret, D., 'Spinoza's *conatus* argument', in O. Koistinen & J. Biro (eds.), *Spinoza: Metaphysical Themes*. Oxford University Press: Oxford, 2002, pp. 127-158.

Gibb, R., 'Developing countries and market access: the bitter-sweet taste of the European Union's sugar policy in southern Africa', *The Journal of Modern Africa Studies*, vol. 42, no. 4, 2004, pp. 563-588.

Gibbs, A. H., *Constitutional Life and the Europe's Area of Freedom, Security and Justice*, Ashgate: Farnham, 2011.

Gold, P., 'Immigration into the European Union via the Spanish enclaves of Ceuta and Melilla: A reflection of regional economic disparities', *Mediterranean Politics*, vol. 4, no. 3, 1999, pp. 23-36.

Grau, R., *Die Diktaturgewalt des Reichspräsidenten und der Landesregierungen: auf Grund des Artikels 48 der Reichsverfassung*, Otto Liebman: Berlin, 1922.

Guild, E., 'Who is an irregular migrant?', in: Barbara Bogusz et.al. (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspective*, Brill Academic Publishers: Leiden, 2004, pp. 3-28.

Gutwirth, S., 'Beyond Identity?', *Identity in the Information Society*, vol. 1, 2008, pp. 123-133.

Habermas, J., *Die Einbeziehung des Anderen. Studien zur politischen Theorie*, Suhrkamp: Frankfurt am Main, 1996.

Habermas, J., 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?', *Political Theory*, vol. 29, no. 6, 2001, pp. 766-781.

Hauriou, M., *Précis de Droit Constitutionnel*, Recueil Sirey: Paris, 1929.

Hauriou, M., 'The Theory of the Institution and the Foundation: A Study of Social Vitalism', in A. Broderick (ed.), *The French Institutionalists. Maurice Hauriou, Georges Renard, Joseph T. Delos*, Harvard University Press: Cambridge, 1970, pp. 93-124.

Hegel, G. W. F., *System of Ethical Life* (1802/3) and *First Philosophy of Spirit* (Part III) of the System of Speculative Philosophy (1803/4), State University of New York Press: Albany, 1979.

Heidegger, M., *Being and Time. A Translation of Sein und Zeit*, State University of New York Press: Albany, 1996.

Henrich, D., 'The Basic Structure of Modern Philosophy', *Cultural Hermeneutics*, vol. 2, 1974, pp. 1-18.

Hildebrandt, M., 'Governance, governmentality, police and justice', *Buffalo Law Review*, vol. 56, 2008, pp. 101-142.

Huysmans, J., 'Migrants as a security problem: dangers of "securitizing" societal issues', in R. Miles & D. Thranhardt (eds.), *Migration and European Integration. The Dynamics of Inclusion and Exclusion*, Pinter: London, 1995, pp. 53-72.

Huysmans, J., 'Security! What Do You Mean? From Concept to Thick Signifier', *European Journal of International Relations*, vol. 4, no. 2, 1998, pp. 226-255.

Huysmans, J., 'Revisiting Copenhagen: Or, On the Creative Development of a Security Studies Agenda in Europe', *European Journal of International Relations*, vol. 4, no. 4, 1998, pp. 479-505.

Huysmans, J., 'Defining Social Constructivism in Security Studies: The Normative Dilemma of Writing Security', *Alternatives*, vol. 27, 2002, pp. 41-62.

Huysmans, J., *The Politics of Insecurity. Fear, Migration and Asylum in the EU*. Routledge: London, 2006.

Huysmans, J., 'The Jargon of Exception – On Schmitt, Agamben and the Absence of Political Society', *International Political Sociology*, no. 2, 2008, pp. 165-183.

Kaunert, C., 'The Area of Freedom, Security and Justice: The Construction of a "European Public Order"', *European Security*, vol. 14, no. 4, 2005, pp. 459-483.

Kelsen, H., *General Theory of State and Law*, Harvard University Press: Cambridge, 1949.

Kelsen, H., 'Wer soll der Hüter der Verfassung sein?', in H. Klecatsky, R. Marčić & Schambeck (eds.), *Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkel und Alfred Verdross* (Band II), Europa Verlag: Wien, 1968, pp. 1873-1922.

Kelsen, H., *The Pure Theory of Law*, University of California Press: Berkeley/Los Angeles/London, 1970.

Kelsen, H., *Vom Wesen und Wert der Demokratie*, Sientia Verlag: Aalen, 1981.

Kelsen, H., *Introduction to the Problems of Legal Theory*, trans. Bonnie L. Paulson & Stanley L. Paulson, Clarendon Press: Oxford, 1992.

Kennedy, E., 'Emergency Government Within the Bounds of the Constitution: An Introduction to Carl Schmitt, "The Dictatorship of the Reich president according to Article 48 R.V."', *Constellations*, vol. 18, no. 3, 2011, pp. 283-297.

Kervégan, J.-F., *Hegel, Carl Schmitt: le politique entre speculation et positivité*. Presses Universitaires de France: Paris, 1992.

Kolodziej, E. A., 'Renaissance in Security Studies? Caveat Lector!', *International Studies Quarterly*, vol. 36, no. 4, 1992, pp. 421-438.

Krause, K. & M. C. Williams, 'Broadening the Agenda of Security Studies: Politics and Methods', *Mershon International Studies Review*, vol. 40, 1996.

Krause, K. & M. C. Williams, 'Preface: Towards Critical Security Studies', in: K. Krause & M. C. Williams (eds.) *Critical Security Studies. Concepts and Cases*. UCL Press: London, 1997, pp. vii-xxi.

Krause, K. & M. C. Williams, 'From Strategy to Security: Foundations of Critical Security Studies', in K. Krause & M. C. Williams (eds.) *Critical Security Studies. Concepts and Cases*. London: UCL Press, 1997, pp. 33-59.

Kundlien, F. & J. Ritter, 'Normal, Normalität' in J. Ritter & K. Gründer (eds.), *Historischen Wörterbuch der Philosophie*, Band 6, Schwabe & Co AG: Basel, 1984, pp. 920-928.

Kurdzialek, M., U. Dierse & R. Kuhlen, 'Chaos', in J. Ritter, K. Gründer & G. Gabriel (eds.), *Historische Wörterbuch der Philosophie*, vol. I, Wissenschaftliche Buchgesellschaft: Darmstadt, 1971, pp. 980-984.

La Torre, M., *Law as Institution*, Springer: Dordrecht, 2010.

Lavenex, S., & W. Wallace, 'Justice and Home Affairs: Towards a "European Public Order"?', in H. Wallace, W. Wallace & M. A. Pollack (eds.), *Policy-Making in the European Union*, Oxford University Press: Oxford, 2005, pp. 457-480.

Lemke, T., *Eine Kritik der politischen Verunft. Foucaults Analyse der modernen Gouvernementalität*, Argument Verlag: Hamburg, 1997.

Lindahl, H., 'Inside and Outside the EU's "Area of Freedom, Security and Justice: Reflexive Identity and the Unity of Legal Space', *Archiv für Rechts- und Sozialphilosophie*, vol. 90, no. 4, 2004, pp. 478-497.

Lindahl, H., '*Jus Includendi et Excludendi*: Europe and the Borders of Freedom, Security and Justice', *The King's College Law Journal*, vol. 16, 2004, pp. 234-247.

Lindahl, H., 'Finding Place for Freedom, Security and Justice: The European Union's Claim to Territorial Unity', *Constitutionalism Web Papers No. 1*, 2004.

Lindahl, H., 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood', in M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*, Oxford University Press: Oxford, 2007, pp. 9-24.

Lindahl, H., 'Border Crossings by Immigrants: Legality, Illegality, and Alegality', *Res Publica*, vol. 14, 2008, pp. 117-135.

Lindahl, H., *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice*, Hart Publishing: Oxford/Portland, 2009.

Lindahl, H., 'Breaking Promises to Keep Them. Immigration and the Boundaries of Distributive Justice', in H. Lindahl (ed.) *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice*, Hart Publishers: Oxford, 2009, pp. 137-159.

Lindahl, H., *Fault Lines of Globalization. Legal Order and the Politics of A-Legality*, Oxford University Press: Oxford, 2013.

Loader, I. & N. Walker, *Civilizing Security*, Cambridge University Press: Cambridge, 2007.

Loughlin, M., 'The concept of constituent power', *European Journal of Political Theory*, 2013, pp. 1-20.

Löwith, K., 'The Occasional Decisionism of Carl Schmitt', in: *Martin Heidegger and European Nihilism*, Columbia University Press: New York, 1995, pp. 137-159.

MacCormick, N. & O. Weinberger, *An Institutional Theory of Law. New Approaches to Legal Positivism*, Kluwer: Dordrecht, 1986.

Marder, M., *Groundless Existence. The Political Ontology of Carl Schmitt*, Continuum: New York/London, 2010.

Maslow, M., 'The Dynamics of Psychological Security-Insecurity', *Journal of Personality*, vol. 10, no. 4, 1942, pp. 331-344.

McCormick, J. P., *Carl Schmitt's Critique of Liberalism. Against Politics as Technology*, Cambridge University Press: Cambridge, 1997.

McHoul, A. & W. Grace, *A Foucault Primer. Discourse, Power and the Subject*, UCL Press: London, 1995.

McSweeney, B., *Security, Identity and Interests. A Sociology of International Relations*. Cambridge: Cambridge University Press, 1999.

Merleau-Ponty, M., *Phénoménologie de la perception*, Gallimard: Paris, 1945.

Merleau-Ponty, M., *The Structure of Behavior*, Beacon Press: Boston, 1963.

Mitzen, J., 'Ontological Security in World Politics: State Identity and the Security Dilemma', *European Journal of International Relations*, vol. 12, no. 3, 2006, pp. 341-370.

Monar, J., 'The Area of Freedom, Security and Justice', in A. von Bogdandy & J. Bast (eds.), *Principles of European Constitutional Law*, Hart Publishing/Verlag CH Beck: Oxford/München, 2010, pp. 551-585.

Mouffe, C., *The Democratic Paradox*, Verso: London, 2000.

Mutimer, D., 'Critical Security Studies: A Schismatic History', in A. Collins (ed.) *Contemporary Security Studies*, Oxford University Press: Oxford, 2010, pp. 84-105.

Nancy, J.-L., *The Inoperative Community*, University of Minnesota Press: Minneapolis, 1991.

Nancy, J.-L., 'La Computation/The Compearance: From the Existence of "Communism" to the Community of "Existence"', *Political Theory*, vol. 20, no. 3, 1992, pp. 371-398.

Nancy, J.-L., 'Finite History', in *The Birth to Presence*, Stanford University Press: Stanford, 1993, pp. 143-166.

Nancy, J.-L., *Le Sens du monde*, Galilée: Paris, 1993.

Nancy, J.-L., 'The decision of existence', in *The Birth to Presence*, Stanford University Press: Stanford, 1993, pp. 82-109.

Nancy, J.-L., *Vérité de la démocratie*, Galilée: Paris, 2008.

Neal, A., *Exceptionalism and the Politics of Counter-Terrorism. Liberty, Security and the War on Terror*. Routledge: London/New York, 2010.

Newman, S., 'Crowned Anarchy: Postanarchism and International Relations Theory', *Millennium. Journal of International Studies*, vol. 40, no. 2, 2012, pp. 259-278.

Oudejans, N., *Asylum. A Philosophical Inquiry into the International Protection of Refugees*, BOXPress BV: Oisterwijk, 2011.

Rawls, J., 'Justice as Reciprocity', *Collected Papers*, Harvard University Press: Cambridge, 1999, pp. 190-224.

Raz, J., 'Kelsen's Theory of The Basic Norm', in: *The Authority of Law. Essays on Law and Morality*, Clarendon Press: Oxford, 1979, pp. 122-145.

Ricoeur, P., *Oneself as Another*, The University of Chicago Press: Chicago/London, 1994.

Ricoeur, P., 'The Political Paradox', in *History and Truth*, 2007, pp. 247-270.

Saward, M., 'The Representative Claim', *Contemporary Political Theory*, vol. 5, 2006, pp. 297-318.

Sassen, S., *Losing Control? Sovereignty in an Age of Globalization*, Columbia University Press: New York, 2015.

Schaap, A., 'Human Rights and the Political Paradox', *Australian Humanities Review*, issue 55, 2013, pp. 1-22.

Schinkel, W., *Aspects of Violence. A Critical Theory*, Palgrave Macmillan: Basingstoke, 2010.

Schmitt, C., *Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf*, Duncker & Humblot: München/Leipzig/Berlin, 1921.

Schmitt, C., *Legalität und Legitimität*, Duncker & Humblot: München/Leipzig, 1932.

Schmitt, C., *Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit*, Hanseatische Verlagsanstalt: Hamburg, 1933.

Schmitt, C., 'Nehmen/Teilen/Weiden. Ein Versuch, die Grundfragen jeder Sozial- und Wirtschaftsordnung von Nomos her richtig zu stellen', in *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954. Materialien zu einer Verfassungslehre*, Duncker & Humblot: Berlin, 1973, pp. 489-504.

Schmitt, C., *Theorie des Partisanen. Zwischenbemerkung zum Begriff des Politischen*, Duncker & Humblot: Berlin, 1975.

Schmitt, C., *Political Theology. Four Chapters on the Concept of Sovereignty*, MIT Press: Cambridge/London, 1985.

Schmitt, C., *The Crisis of Parliamentary Democracy*, MIT Press: Cambridge/London, 1985.

Schmitt, C., *Roman Catholicism and Political Form*, Greenwood Press: Westport/London, 1996.

Schmitt, C., *On the Three Types of Juristic Thought*, Praeger: Westport/London, 2004.

Schmitt, C., *The Nomos of the Earth in the International Law of Jus Publicum Europaeum*, Telos Press: New York, 2006.

Schmitt, C., *The Concept of the Political*, The University of Chicago Press: Chicago/London, 2007.

Schmitt, C., *Constitutional Theory*, Duke University Press: Durham/London, 2008.

Schmitt, C., 'The Dictatorship of the Reich president according to Art 48 of the Reich constitution', trans. E. Kennedy, *Constellations*, vol. 18, no. 3, 2011, pp. 299-323.

Schürmann, R., 'Questioning the Foundations of Practical Philosophy', *Humans Studies: A Journal for Philosophy and the Social Sciences*, vol. 1, no. 4, 1978, pp. 357-368.

Smend, R., *Verfassung und Verfassungsrecht*, in *Staatsrechtliche Abhandlungen und andere Aufsätze*, 1968, pp. 119-276.

Soddu, P., 'Ceuta and Melilla: Security, Human Rights and Frontier Control', *Panorma*, 2006, pp. 212-214.

Sombart, N., 'Die Angst vor dem Chaos. Zum Carl-Schmitt-Syndrom', *Merkur. Deutsche Zeitschrift für europäisches Denken*, vol. 40, no. 498, 1990, pp. 638-651.

Stolleis, M., *A History of Public Law in Germany 1914-1945*, Oxford University Press: Oxford, 2004.

Taylor, C., *Sources of the Self. The Making of the Modern Identity*, Cambridge University Press: Cambridge, 1989.

Twomey, P., 'Constructing a Secure Space: The Area of Freedom, Security and Justice', in D. O'Keefe & P. Twomey (eds.), *Legal Issues of the Amsterdam Treaty*, Hart Publishing: Oxford, 1999, pp. 351-374.

- Ullman, R. H., 'Redefining Security', *International Security*, vol. 8, no. 1, 1983, pp. 129-153.
- Van Houtum, H., & R. Pijpers, 'The European Union as a Gated Community: The Two-faced Border and Immigration Regime of the EU', *Antipode*, vol. 39, no. 2, 2007, pp. 291-309.
- Van Munster, R., 'Security as a Shoestring: A Hitchhiker's Guide to Critical Schools of Security in Europe', *Cooperation and Conflict: Journal of the Nordic International Studies Association*, vol. 42, no. 2, 2007, pp. 235-243.
- Van Roermund, B., *Law, Narrative and Reality. An Essay in Intercepting Politics*, Kluwer Academic Publishers: Dordrecht/Boston/London, 1997.
- Van Roermund, B., 'First-Person Plural Legislature: Political Reflexivity and Representation', *Philosophical Explorations*, vol. 6, no. 3, 2003, pp. 235-252.
- Van Roermund, B., 'The Law and "We"', *Ethical Perspectives: Journal of the European Ethics Network*, vol. 13, no. 3, 2006, pp. 525-553.
- Van Roermund, B., *Legal Thought and Philosophy. What Legal Scholarship is About*, Edward Elgar: Cheltenham/Northampton, 2013.
- Veyne, P., 'Foucault Revolutionizes History', in A.I. Davidson (ed.), *Foucault and his interlocutors*, The University of Chicago Press: Chicago, 1997, pp. 146-182.
- Visker, R., *Truth and Singularity. Taking Foucault into Phenomenology*. Dordrecht: Kluwer Academic Publishers, 1999.
- Visker, R., 'Inleiding. Pluralisme en Transcendentie', in *Vreemd gaan en vreemd blijven. Filosofie van de multiculturaliteit*, SUN: Nijmegen, 2005, pp. 13-28.
- Voegelin, E., 'Die Verfassungslehre von Carl Schmitt. Versuch einer konstruktiven Analyse ihrer Staatstheoretischen Prinzipien', *Zeitschrift für Öffentliches Recht*, vol. 11, 1931, pp. 89-109.
- Waever, O., 'Securitization and Desecuritization', in R. D. Lipschutz (ed.) *On Security*, Columbia University Press: New York, 1995, pp. 46-86.
- Waever, O., 'European Security Identities', *Journal of Common Market Studies*, vol. 34, no. 1, 1996, pp. 103-132.

Waever, O. & B. Buzan, 'After the Return to Theory: The Past, Present, and Future of Security Studies', in A. Collins (ed.) *Contemporary Security Studies*. Oxford: Oxford University Press, 2010, pp. 463-483.

Waldenfels, B., 'The other and the foreign', *Philosophy and Social Criticism*, vol. 21, no. 5/6, 1995, pp. 111-124.

Waldenfels, B., *Topographie des Fremden. Studien zur Phänomenologie des Fremden 1*, Suhrkamp: Frankfurt am Main, 1997.

Waldenfels, B., *Vielstimmigkeit der Rede. Studien zur Phänomenologie des Fremden 4*, Suhrkamp: Frankfurt am Main, 1999.

Waldenfels, B., *Verfremdung der Moderne. Phänomenologische Grenzgänge*, Wallstein Verlag: Göttingen, 2001.

Waldenfels, B., 'The Boundaries of Orders', *Philosophica*, vol. 73, 2004, pp. 71-86.

Waldenfels, B., *Hyperphänomene. Modi hyperbolischer Erfahrung*, Suhrkamp: Frankfurt am Main, 2012.

Waline, M., 'Maurice Hauriou', in A. Broderick (ed.), *The French Institutionalists. Maurice Hauriou, Georges Renard, Joseph T. Delos*, Harvard University Press: Cambridge, 1970, pp. 139-160.

Walker, N., (ed.), *Europe's Area of Freedom, Security and Justice*, Oxford University Press: Oxford, 2004.

Walker, R. B. J., *Inside/outside: international relations as political theory*. Cambridge University Press, Cambridge, 1993.

Walker, R. B. J., 'The Subject of Security', in K. Krause & M. C. Williams (eds.), *Critical Security Studies. Concepts and Cases*, London: UCL Press, 1997, pp. 61-81.

Walt, S. M., 'The Renaissance of Security Studies', *International Studies Quarterly*, vol. 35, no. 2, 1991, pp. 211-239.

Waltz, K. N., *Theory of International Politics*. Reading: Addison-Wesley, 1979.

Weber, M., *Economy and Society. An Outline of Interpretative Sociology*, University of California Press: Berkeley, 1978.

Williams, M. C., 'Words, Images, Enemies: Securitization and International Politics', *International Studies Quarterly*, vol. 47, 2003, pp. 511-531.

Zapata-Barrero, R., 'Political Discourses about Borders: On the Emergence of a European Political Community', in: H. Lindahl (ed.), *A Right to Inclusion and Exclusion? Normative Fault Lines of the EU's Area of Freedom, Security and Justice*, Hart Publishing: Oxford/Portland, 2009, pp. 15-31.

EU Treaties and Documents

Consolidated version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 325, 24 December 2002.

Council of the European Union, *A Secure Europe in a Better World – European Security Strategy*, 12 December 2003.

Council of the European Union, *The Hague Programme: strengthening Freedom, Security and Justice in the European Union*, 2004.

European Commission, Communication 459/98, 'Towards an Area of Freedom, Security and Justice', *Bulletin of the European Union*, 7/8, 1998, pp. 152-157.

Presidency Conclusion, Tampere European Council 15 and 16 October 1999.

The Treaty of Amsterdam Amending The Treaty On European Union, The Treaties Establishing The European Communities And Certain Related Acts, 2 October 1997.

Treaty Establishing the European Economic Community, 22 March 1957.

Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 115, 9 may 2008.

Treaty on the Functioning of the European Union, *Official Journal of the European Union*, C 326, 26 October 2012.

Court case

Hoge Raad, zaaknummer 00233/06, January 2007.

Reports

Asociación Pro Derechos Humanos de Andalucía, *Human Rights on the Southern Border 2014*, 2014.

Bigo, D., S. Carrera, E. Guild & R. B. J. Walker, 'The Changing Landscape of European Liberty and Security: The Mid-Term Report of the Challenge Project', *CEPS Research Paper No. 4*, 2007.

Bigo, D., E. Guild & S. Carrera, 'The CHALLENGE Project: Final Policy Recommendations on the Changing Landscape of European Liberty and Security', *CEPS Research Paper No. 19*, 2009.

Human Rights Watch, *Abused and Expelled. Ill-Treatment of Sub-Saharan African Migrants in Morocco*, February 2014.

Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, *Dierenrechtenactivisme in Nederland. Grenzen tussen vreedzaam en vlammend protest*, July 2004.

Morehouse, C. & M. Blomfield, *Irregular Migration in Europe*, Migration Policy Institute: Washington DC, 2011.

Oxfam International, 'Dumping on the world. How EU sugar policy hurt poor countries', *Oxfam Briefing Paper no. 61*, March 2004.

Oxfam International, 'A Sweeter Future? The potential for EU sugar reform to contribute to poverty reduction in southern Africa', *Oxfam Briefing Paper no. 70*, November 2004.

Webresources

<https://twitter.com/PRODEINORG/status/524927960961527808>

https://en.wikipedia.org/wiki/Curtis_Culwell_Center_attack

https://en.wikipedia.org/wiki/Stop_Islamization_of_America

News Items

The Guardian, 'African migrants look down on white-clad golfers in viral photo', 23 October 2014.

Time, 'Surreal Scene of Migrants Atop Spanish Border Fence', 23 October 2014.

Le Monde, 'La tuerie de Musée de juif de Bruxelles qualifiée d'acte «terroriste»', 26 May 2014.

Abstract

This book is dedicated to the problem of collective security. It is aimed at developing a critical conception of collective security i.e., a conception that provides a critical angle but also accounts for its intrinsic value. The collective perspective on security, which may, but not necessarily be understood in terms of the state, is distinctive in that it forestalls a reduction to individual security and, for that matter, a simple opposition between security and fundamental rights. In order to develop a critical conception of collective security the book starts by discussing two dominant conceptions, the discursive approach based on Michel Foucault's theory of governmentality and the existential approach that can be abstracted from Carl Schmitt's political and legal philosophy. The analysis of these two approaches provides crucial insight into the deep structure of collective security. The concept of collective security presupposes the notion of collective subjectivity as an instance that needs to be secured and as an instance that can be secure or insecure. This means that there is an internal correlation between the conceptions of collective security defended by the discursive, Foucaultian and the existential, Schmittean approaches and their respective interpretations of collective subjectivity. Discussing the discursive, Foucaultian and the existential, Schmittean approaches, the book claims that both approaches fail to provide an adequate conception of collective security because they have a reductive interpretation of collective subjectivity. In order to overcome the pitfalls of the aforementioned approaches, the book undertakes an elaboration of an alternative conception of collective security, a critical existential conception, in close discussion with the existential, Schmittean approach while integrating the critique put forward by the discursive, Foucaultian approach.

The book first analyzes the critical conception of collective security as elaborated by the discursive, Foucaultian approach (Chapter 1). This approach defines collective security as a technique of government. The conception of security as technique of government revolves around the idea that the definition of an issue as an existential threat, i.e. a problem of existence/non-existence, is the result of a process of security framing i.e., institutional, technocratic and technological processes of securitization. Security is a social and political construction that leads to the exceptionalization of an issue, placing it from the realm of normal into the realm of exceptional politics and thus limiting the options to deal with security threats. The concep-

tion of security as technique of government follows from the interpretation of collective subjectivity assumed by the discursive, Foucaultian approach. This approach interprets collective subjectivity reductively as a mere social and political construction, viewing it only from a third-person perspective as an instance that needs to be secured, and not from the first-person perspective as an instance that can be secure or insecure.

In order to regain the first-person perspective of a collective subject, the book turns to the existential, Schmittian approach (Chapter 2), one of the main targets of the discursive, Foucaultian approach. Giving pride a place to the collective subject from a first-person perspective as an existential unity, Schmitt defines collective security as collective self-preservation. In Schmitt's interpretation, collective self-preservation boils down to enforcing the original boundaries of a collective subject. This conception of collective security follows from Schmitt's account of collective subjectivity. Schmitt interprets the existential unity of a collective subject reductively as a substantial unity. If a collective subject is understood in the reified sense of a substantial unity, it is inevitable that security threats are perceived as a problem of existence/non-existence. It is therefore inevitable that collective security, in Schmitt's definition, calls for all or nothing responses by the collective subject, as illustrated by the distinction between friend and enemy.

Since the conceptions of collective security as technique of government and as collective self-preservation fail as critical conceptions of collective security – the former providing an exclusively critical angle and the latter only accounting for its intrinsic value – the book attempts to outline a third approach (Chapter 3). Radically transforming Schmitt's interpretation of collective self-preservation and integrating the critical points put forward by the discursive, Foucaultian approach, the book elaborates a critical existential conception of collective security, defining it as collective self-assertion. The key to the conception of collective security as collective self-assertion is a reflexive understanding of the existential unity of a collective subject. The members of a collective can be conceived as a unity not simply because they are the same, but rather to the extent that they view themselves as partaking in the same unity. This reflexive self-relation of collective subjectivity takes place through time as representation. A representation is a putative claim to unity establishing who is part of the collective subject and what it is about, making the existential unity of a collective subject irredeemably contingent both in the sense of what it is as a unity and that it exists as a unity. The reflexive, representational structure of collective subjectivity implies that collective security is ambiguous. Security issues can be interpreted both as threats, i.e. problems of existence/non-existence, and as challenges opening up transformative possibilities of a collective subject. Accordingly, collective self-assertion means boundary setting; it is not only about enforcing but also about transforming the boundaries of collective subjectivity.

Comparing the three conceptions of collective security outlined in this book, they are applied to a case study (Chapter 4), namely, the responses by Spanish and European Union authorities to African migrants who seek irregular entry into Ceuta and Melilla by climbing the border fences which separate these two Spanish enclaves from Morocco. The discursive, Foucaultian approach insists that by framing the African migrants as security problem implies a

(re)production of insecurity, discounting these migrants as human rights holders and as workers. The existential, Schmittean approach on the other hand provides a substantiation of the responses by authorities, even in the case of human rights violations, since it perceives the African migrants as an existential threat to Spain and the European Union. Alternatively, the critical existential approach makes an argument to broaden the security perspective, not only focusing on individual migrants but, for example, also taking account of the macro-economic dynamics related to the external borders of the European Union. To the extent that African migrants also form a challenge to the European Union as an economic unity, securing the external borders of the European Union should not be limited to the narrow understanding of boundary enforcement against individual migrants but should also include reflecting on the economic policies of the European Union.

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